84-954

Office - Supreme Court, U.S.
FILED
DEC 15 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF PRAIRIE VIEW, TEXAS
and ERISTUS SAMS,
Petitioners,

versus

ALVIN I. THOMAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN W. BATCHAN, JR.
608 Fannin, Suite 440
Houston, Texas 77002
(713) 223-4015
Attorney for Petitioner
City of Prairie View, Texas

MICHAEL A. MANESS
2000 North Loop West, Suite 123
Houston, Texas 77018
(713) 957-2800
Attorney for Petitioner
Eristus Sams

December 1984

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

(1) Whether culpable acts or policies of city officials are attributable to the governing body even though done by an official to which the governing body has not given authority to act or to make policy, under 42 U.S.C. section 1983.

(2) Whether a public official who conducts an investigation and files a criminal complaint in a purely private, non-official capacity may be held liable for that conduct under 42 U.S.C. section 1983.

LIST OF PARTIES

The parties to this proceeding in the Court of Appeals were as follows:

Defendants-Appellants: City of Prairie View, Texas and Eristus Sams.

Plaintiff-Appellee: Alvin I. Thomas.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	I
LIST OF PARTIES	I
TABLE OF AUTHORITIES	III
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	13
APPENDIX:	
Opinion of the Court of Appeals	A-1
Opinion of the Court of Appeals on petition for rehearing	A-18
Findings of Fact and Conclusions of Law	A-22
Final Judgment	A-43
Order and Supplemental Findings of Fact and Conclusions of Law	A-44

TABLE OF AUTHORITIES

CASES	Page
Baker v. McCollan, 443 U.S. 137 (1979)	10
Beker Phosphate Corporation v. Muirhead, 581 F.2d 1187 (5 Cir., 1978)	11
Bennett v. City of Slidell, 728 F.2d 762 (5 Cir., 1984)	6
Bowen v. Watkins, 669 F.2d 979 (5 Cir., 1982)	7
Buckley Towers Condominium, Inc. v. Buchwald, 595 F.2d 253 (5 Cir., 1979)	11
Curry v. Ragan, 257 F.2d 449 (5 Cir., 1958)	11
Grow v. Fisher, 523 F.2d 875 (7 Cir., 1975)	11
Houston v. Finn, 161 S.W.2d 776	7
Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982)	12
Lyons v. Baker, 180 F.2d 893 (5 Cir., 1950), *cert. denied,* 340 U.S. 828 (1950)	11
Martin v. King, 417 F.2d 458 (10 Cir., 1969)	11
Martinez v. California, 444 U.S. 277 (1980)	10, 11
Monell v. Department of Social Services, 436 U.S. 658 (1978)	3, 6
Nesmith v. Alford, 318 F.2d 110 (5 Cir., 1963), *cert. denied,* 375 U.S. 975 (1964)	11
Parratt v. Taylor, 451 U.S. 527 (1981)	12
Paskaly v. Seale, 506 F.2d 1209 (9 Cir., 1974)	11
Paul v. Davis, 424 U.S. 693 (1976)	9
Rodriguez v. Ritchey, 556 F.2d 1185 (5 Cir., 1977), *cert. denied,* 434 U.S. 1047 (1978)	10
Smith v. Gonzales, 670 F.2d 522 (5 Cir., 1982), *cert. denied,* 459 U.S. 1005 (1982)	10
Stump v. Sparkman, 435 U.S. 349 (1978)	3, 10
Thomas v. Sams, 734 F.2d 185 (5 Cir., 1984) on petition for rehearing, 741 F.2d 783 (5 Cir., 1984)	1, 8
Turpin v. Mailet, 619 F.2d 196 (2 Cir., 1980)	7, 8
United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950)	12

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF PRAIRIE VIEW, TEXAS
and ERISTUS SAMS,
Petitioners,

versus

ALVIN I. THOMAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners City of Prairie View, Texas and Eristus Sams respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on May 29, 1984.

OPINION BELOW

The initial opinion of the Court of Appeals is reported as *Thomas v. Sams,* 734 F.2d 185 (5 Cir., 1984). The Court's opinion on petition for rehearing and suggestion for rehearing en banc is reported at 741 F.2d 783 (5 Cir. 1984). Both opinions are reproduced in the Appen-

dix of this petition beginning at page A-1. The Findings of Fact, Conclusions of Law and Final Judgment of the Trial Court are reproduced at page A-22.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on May 29, 1984. Thereafter a timely petition for rehearing and suggestion for rehearing en banc was filed and denied with written opinion on September 17, 1984. This petition for certiorari was filed within 90 days thereafter and is therefore timely under 28 U.S.C. section 2101(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case arises under the due process clause of the Fourteenth Amendment to the Constitution of the United States and 42 U.S.C. section 1983, which provides as follows:

> 42 U.S.C. section 1983:
>
> *"Civil action for deprivation of rights*
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Respondent Alvin I. Thomas, then the President of Prairie View A&M University, filed this action against the Petitioner City of Prairie View, Texas, its then Mayor and Municipal Judge, Petitioner Eristus Sams and its Chief of Police, Booker T. Morgan, alleging essentially that Thomas had been falsely arrested by Morgan, on a complaint and arrest warrant issued by Sams, for the alleged offense of destroying city property following a controversy that had erupted between the University and the City involving the construction of City sewer lines across University property. The complaint alleged only claims under 42 U.S.C. section 1983 and the Fourteenth Amendment; it did not assert pendent State law claims for false arrest, false imprisonment, malicious prosecution or abuse of process (R. 1, 252-262).

In their answer (R. 1, 239-243) Sams and Morgan admitted the substance of the complaint's factual allegations but contended that, in ordering and effecting Thomas' arrest, they had acted in good faith and with probable cause to believe that Thomas had committed a criminal offense. Both Sams and Morgan claimed absolute immunity for their acts, Sams under the doctrine of judicial immunity enunciated by *Stump v. Sparkman,* 435 U.S. 349 (1978) and Morgan on the grounds that he had merely executed an arrest warrant in a lawful manner. In addition, the City claimed exemption from liability under the doctrine of *Monell v. Department of Social Services,* 436 U.S. 658, 694 (1978) on the grounds that the criminal prosecution and the resulting arrest had not been undertaken pursuant to a "policy or custom" of the City of Prairie View but solely at the behest of Sams, acting in a purely private capacity.

The controversy originally began in 1972, when the City and the University jointly agreed in principle to construct and operate a sewage collection facility to serve the City and the University campus. The Fifth Circuit's initial opinion, 734 F.2d at 187-88 succinctly paraphrases the findings of the Trial Court with respect to what subsequently happened:

> "Various problems delayed construction of the City's sewage collection facilities. Mayor Sams concluded that the University was unreasonably delaying completion of the City's collection lines, and thus creating a health hazard. The Board of Regents, which had sole authority over such matters, had not approved the easement, service rates, or the plan for construction of the lines because there were legitimate objections on an engineering basis to the City's plans. Despite his awareness that Board approval was a prerequisite but had been denied, Mayor Sams directed the sewer contractor to complete the construction of a four-inch and a six-inch sewer line across University property and to connect these lines to the University's collection and treatment facility. Dr. Thomas instructed Dr. Decatur Rogers, the administrator in charge of the University's physical plant, to do "whatever was necessary" to prevent the City from running sewage through the completed lines. Accordingly, in May, 1978, under the personal supervision of Dr. Rogers, University personnel cut out and capped several sections of pipe in both lines.
>
> Sams signed a complaint charging Dr. Thomas with committing a criminal offense by 'coercing' Rogers to destroy City property. The complaint is signed 'Eristus Sams, Mayor,' but the district court found that, because the City Council had not voted to authorize the mayor to issue the complaint, 'Sams acted as a private citizen in swearing out his complaint although his signature included his govern-

> mental title.' The district court also found that Sams acted with 'personal animosity, malice, and lack of good faith.' Acting in his role as magistrate, Sams then issued a warrant for Thomas's arrest, based on the complaint that he had himself just signed. Pursuant to the warrant the Chief of Police arrested Thomas. Sams, as magistrate, set bond in the amount of $200, the maximum fine that could be exacted by the Municipal Court.
>
> Thomas attempted to give a personal check as bond; but Sams, acting either as magistrate or municipal judge, refused to accept the check because he believed its payment would be stopped. After slightly over two hours detention, Thomas succeeded in posting the bond in cash and was released."

Following a two-day, non-jury trial, the District Court entered Findings of Fact and Conclusions of Law (R. 1, 36-57), rejecting Sams' claim of judicial immunity, good faith and probable cause but exonerating Morgan and the City. Concluding that the City's construction of the pipeline was a "continued, egregious trespass," the Trial Court found that the University's conduct had been lawful; that Sams lacked probable cause to believe a crime had been committed and had acted with malice and that, while Sams' judicial acts were absolutely immune from civil liability, the non-judicial acts (the investigation into the destruction of the sewer line and the filing of the criminal complaint) provided a basis for the imposition of section 1983 liability. Thomas was awarded against Sams compensatory damages in the amount of $7,500.00, punitive damages in the amount of $2,500.00 and attorney's fees in the amount of $15,000.00 (R. 1, 29-30; 7-15).

On appeal a panel of Court of Appeals affirmed the judgment as to Petitioner Sams but reversed as clearly

erroneous the Trial Court's findings that Sams' actions had not represented official City policy. Despite a concession by Thomas' counsel at oral argument that the Trial Court had not clearly erred in finding that Sams had acted in a purely private capacity in signing the criminal complaint against his client, the panel likewise rejected that finding, concluding *de novo* that Mayor Sams, as required by section 1983, had acted "under color" of State law by engaging in the conduct for which he was ultimately held liable.

On petition for rehearing and suggestion for rehearing en banc, the Fifth Circuit reiterated its earlier position that, with respect to Sams' investigation of the destruction of the sewer lines and filing of the criminal complaint, he had acted in an official policy-making capacity on behalf of the City and that, accordingly, the City was jointly liable with him for his actions.

REASONS FOR GRANTING THE WRIT

Petitioner City of Prairie View, Texas

The issue in this case is whether the governing body of the City of Prairie View gave a city official the authority to commit a culpable act. A municipality is liable for damages under Section 1983 when execution of the Government's policy or custom whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury. *Monell v. Department of Social Services,* 436 U.S. 658 (1978). A city official's edicts or acts do not render the city liable even in a case in which a fact finder might fairly say that the edicts or acts were official policy. *Bennett v. City of Slidell,* 728 F.2d 762 (5 Cir., 1984). The

policy is that of the city where it is made by an official under authority to do so given by the governing authority. *Id.* at 769. Finally, the issue of authorization, approval or encouragement is generally one of fact and not law. *Turpin v. Mailet,* 619 F.2d 196 (2 Cir., 1980). See also *Bowen v. Watkins,* 669 F.2d 979 (5 Cir., 1982).

The Court of Appeal's decision in this case sets a precedent which is unduly harsh on municipal governments. The mayor of a city is looked to for leadership and traditionally has the authority to do what is necessary to get things done. However, there are certain things which he cannot do unless the authority is given by the city council. The city council can only give its approval by majority vote, in a public hearing, witnessed by official minutes signed and sealed by the city secretary. See Vernon's Annotated Civil Statutes Art. 996. Unless authorized by charter or by ordinance, the mayor of a city has no power to bind the municipality by contract. *Houston v. Finn,* 161 S.W.2d 776.

The Fifth Circuit *correctly* held that the record contains uncontradicted evidence that the city council of Prairie View entrusted the entire conduct of the installation of the sewage lines and the resultant pipeline dispute to Mayor Sams.

The Fifth Circuit *correctly* held that he was given the final authority to define the city's goals with respect to the sewage treatment project and to choose the means of achieving those goals.

The Fifth Circuit *erroneously* held that the authority given Mayor Sams to complete the project included torts against citizens in order to accomplish these goals. Clearly the Mayor could not bind the City to pay money on a

contract for the next 10 years without a formal vote of the council, publicly held and witnessed by an ordinance. This same reasoning applies to this case.

Sams testified that he had reported regularly to the council on the progress of the pipeline; that they knew it was crossing University land; and that he had sent the Chief of Police to the University to supervise the operation and, inferentially, to prevent interference with it. Sams announced completion of the line at a regular Monday night council meeting. Subsequently the University warned the City by letters that the line would be intersected if it was not removed. After the lines had been cut and capped, Jack Echols, the council member who was Mayor Pro Tem, rushed to report the offense to the Mayor. The Fifth Circuit concluded that although Mayor Sams denied at trial that Councilman Echols knew that Sams planned to arrest anyone, the councilman's written statement to the Mayor shows that *he* expected police action on the offense.

The Fifth Circuit *erroneously* concluded that Echols' actions indicated that the council had not only delegated authority to the Mayor but knew what he was doing. The Fifth Circuit correctly concluded that at least one council member thought Sams had authority to act and was urging him to do so. *Thomas v. Sams,* 734 F.2d 185 (5 Cir., 1984).

Case law tells us that the issue of authorization, approval or encouragement is generally one of fact and not law. *Turpin v. Mailet,* 619 F.2d 196 (2 Cir., 1980). The facts in this case indicate that the city council expected, the Mayor of the City to handle this dispute. The facts also indicate that one council member wrote

the Mayor implying that he expected police action over this matter.

The facts do not indicate that the City Council acting as a body at a public meeting expected police action or was even aware of the actions subsequently taken by Mayor Sams and causing this law suit. A council member has no authority to bind a city with any act, other than his vote at a public hearing. His vote has no authority unless it is joined by a majority of the other council members' votes if they represent a quorum. Mr. Echols' acts could only represent the acts of one private citizen. The Fifth Circuit clearly rendered its opinion without considering the Texas State Laws pertaining to how municipal governments can legally be bound by the acts of city officials.

All of the evidence in this case establishes that the governing body of the City of Prairie View *did not* give the Mayor the authority to commit a culpable act against Dr. A. I. Thomas.

Petitioner Sams

The Court of Appeals' decision in this case effects a sweeping and unprecedented extension of Federal civil rights liability to conduct that has heretofore been regarded as exclusively within the province of State tort law. Because this Court has repeatedly rejected a reading of section 1983 that would "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," *Paul v. Davis,* 424 U.S. 693, 701 (1976), review of this case by certiorari is warranted.

The Fifth Circuit correctly concluded that Sams had acted in a judicial capacity in issuing the arrest warrant,

presiding in the subsequent hearing and fixing bail, and accordingly was judicially immune for such actions, not undertaken "in the clear absence of all jurisdiction," *Stump v. Sparkman,* 435 U.S. 349, 357 (1978), "even if his exercise of authority [was] flawed by the commission of grave procedural errors." 435 U.S. at 359. Instead, however, the Court apparently predicated section 1983 liability exclusively upon acts that were in no meaningful sense "official" in character—that is, the investigation into the circumstances surrounding the cutting of the pipes and the signing of the criminal complaint.

The Trial Court correctly had held that such acts were not undertaken "under color of State law." They did not, in and of themselves, violate any recognized Federal constitutional or statutory right. Section 1983 imposes civil liability only upon individuals, acting under color of law, who subject another person "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws [of the United States]." As this Court has repeatedly observed, "[s]ection 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of [State] tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." *Baker v. McCollan,* 443 U.S. 137, 146 (1979); see also *Smith v. Gonzales,* 670 F.2d 522, 526 (5 Cir., 1982), *cert. denied,* 459 U.S. 1005 (1982); *Rodriguez v. Ritchey,* 556 F.2d 1185 (5 Cir., 1977) (en banc), *cert. denied,* 434 U.S. 1047 (1978).

Moreover, contrary to the implication in the Fifth Circuit's opinion, "it is perfectly clear that not every injury in which a state official has played some part is actionable under [42 U.S.C. section 1983]." *Martinez*

v. California, 444 U.S. 277, 285 (1980). The Courts of Appeals have consistently held that the Federal constitution does not secure a person against unfounded or malicious claims or suits in a State court. See, e.g., *Curry v. Ragan,* 257 F.2d 449, 450 (5 Cir., 1958), *cert. denied,* 358 U.S. 851; *Nesmith v. Alford,* 318 F.2d 110, 126 (5 Cir., 1963), *cert. denied,* 375 U.S. 957 (1964); *Lyons v. Baker,* 180 F.2d 893, 895 (5 Cir., 1950), *cert. denied,* 340 U.S. 828 (1950). See also *Paskaly v. Seale,* 506 F.2d 1209, 1212-13 (9 Cir., 1974); *Martin v. King,* 417 F.2d 458, 462 (10 Cir., 1969); *Grow v. Fisher,* 523 F.2d 875, 879 (7 Cir., 1975).

The Fifth Circuit itself squarely held in *Buckley Towers Condominium, Inc. v. Buchwald,* 595 F.2d 253, 254 (5 Cir., 1979), that "the Civil Rights Acts do not provide a remedy against unfounded or even malicious claims or suits in state courts." "[C]onduct which merely engenders common law tort liability, without infringing on constitutionally protected interests, is not a sufficient basis to support a cause of action under Section 1983. Section 1983 simply does not provide a remedy for mere common law torts, even though committed under color of state law." *Beker Phosphate Corporation v. Muirhead,* 581 F.2d 1187, 1189 (5 Cir., 1978) (footnote omitted).

Moreover, the mere filing of the criminal complaint would plainly not have constituted an independent violation of Thomas' right to due process of law if the arrest warrant had not simultaneously been issued. By no conceivable stretch of the imagination did the mere initiation of a criminal charge constitute a "deprivation" of Thomas' "liberty" within the meaning of the Fourteenth Amendment. To hold otherwise would amount to recognizing a Federal cause of action for every improperly

instituted criminal proceeding in the courts of any State, irrespective of whether the accused was ever brought to trial or even taken into custody.

If the Court of Appeals is correct, the torts of all public officials have now become fair subjects for Federal civil rights actions. "It is hard to perceive any logical stopping place to such a line of reasoning. Presumably, under this rationale any party who is involved in nothing more than an automobile accident with a state official could allege a constitutional deprivation under section 1983." *Parratt v. Taylor,* 451 U.S. 527, 544 (1981).

The most fundamental problem with the Fifth Circuit's approach is that, while rejecting as "clearly erroneous" the Trial Court's finding that Sams acted in a purely private rather than official capacity in investigating the pipe-cutting and filing the criminal complaint,* the Court provides no clue as to how a Judge is to distinguish between "governmental" and "private" actions of public officials for purposes of section 1983 liability. Certainly it is difficult to ascribe the conduct involved in this case to the office of the Mayor of a municipality. It is simply no part of the traditional function of such an elected public official to investigate crimes or to file criminal actions in the name of the government. It is accordingly altogether inappropriate to indulge a presumption that

---

* The Court of Appeals clearly erred in rejecting the Trial Court's finding under the "clearly erroneous" standard prescribed by Rule 52(a) of the Federal Rules of Civil Procedure. "That Rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to weigh the evidence." *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.,* 456 U.S. 844, 855 (1982), and cannot be ignored simply because this Court of Appeals "might give the facts another construction [and] resolve the ambiguities differently * * * ." *United States v. National Association of Real Estate Boards,* 339 U.S. 485, 495 (1950).

public officials invariably act in their "official" capacities simply because they have engaged in allegedly tortious misconduct.

The totality of the record evidence establishes that the non-judicial, non-official conduct underlying this judgment was simply not undertaken "under color of law," nor did it by itself effect any deprivation of any recognized Federal constitutional or statutory right. To hold otherwise is to expand the scope of section 1983 to encompass every tortious act by a State public official. Such an expansion is warranted neither by the history of section 1983 nor by judicial precedent; it presents an appropriate occasion for the exercise of this Court's certiorari jurisdiction.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully pray that their petition for a writ of certiorari in this cause be granted.

Respectfully submitted,

JOHN W. BATCHAN, JR.
608 Fannin, Suite 440
Houston, Texas 77002
(713) 223-4015

Attorney for Petitioner
City of Prairie View, Texas

MICHAEL A. MANESS
2000 North Loop West, Suite 123
Houston, Texas 77018
(713) 957-2800

Attorney for Petitioner
Eristus Sams

APPENDIX A

Dr. Alvin I. THOMAS, Plaintiff-Appellee,
Cross-Appellant,

v.

Eristus Sams, Individually and As
Mayor of Prairie View,
Defendant-Appellant,

and

City of Prairie View, Defendent-
Cross-Appellee.

No. 82-2359

United States Court of Appeals,
Fifth Circuit.

May 29, 1984.

Appeals from the United States District Court for the Southern District of Texas.

Before RUBIN and RANDALL, Circuit Judges, and MITCHELL*, District Judge.

ALVIN B. RUBIN, Circuit Judge:

In the course of a dispute concerning the construction by a city of a sewer line across a university campus, a city mayor, who was also ex officio its magistrate and municipal judge, signed a criminal complaint against the university's president. Then, in his capacity as magistrate,

* United States District Judge, Eastern District of Louisiana, sitting by designation.

he issued a warrant for the president's arrest. As a result, the president was detained for more than two hours until he was able to post a cash bond. Invoking 42 U.S.C. § 1983, the president sued the city and the city official. Although the actions taken by the city official in his judicial capacity as a magistrate were shielded by judicial immunity, we affirm the bench-trial judgment against the city official because the arrest warrant did not immunize his prior illegal conduct. The court rejected the president's claim against the city on the bases that the city had not authorized the mayor to arrest the president and the court was "unwilling to impose liability upon local governments because of the strictly legal actions of their judicial officers." Because the record demonstrates that the mayor's actions represented city policy, we reverse the judgment in favor of the city and hold it jointly liable with its mayor.

I.

The following facts were found by the district court. The City of Prairie View is an incorporated Texas municipality with a population of 4,000 most of whom are faculty, staff members, and students of Prairie View A & M University. Dr. Alvin I. Thomas is president of the University. Eristus Sams is the City's mayor and, ex officio under Texas law,[1] its municipal judge and magistrate. As magistrate, he is authorized to issue process and warrants for the arrest of offenders; as municipal judge he has jurisdiction over persons committing offenses within the City's corporate limits, including the University campus, for which the maximum punishment is a $200 fine.

---

1. Tex. Rev. Civ. Stat. Arts. 1007, 1196, 1197; Texas Code of Cr. Proc. Arts. 2.09 and 2.10.

The University maintains sewage collection and treatment facilities for its own use and has also provided sewage treatment for a small part of the City on a contract basis. Until 1972, most of the City outside of the University campus was without sewer service. That year, the City sought a federal grant to construct and to operate a sewage facility and to extend its sewer lines. The University also sought a federal grant to construct and to operate an additional sewer facility and to bring its operation into compliance with the Federal Water Pollution Act. To avoid seeking two grants, and to facilitate early accomplishment of both objectives, the City and the Texas A & M University Systems Board of Regents, which had supervisory authority over the University, jointly agreed to operate a sewage collection system serving all parts of the City, including the University campus. The City was to construct the necessary additional collection lines. At the outset, the University was to treat the City's sewage on a contract basis. Eventually, the City was to build a City treatment plant to treat all sewage.

Various problems delayed construction of the City's sewage collection facilities. Mayor Sams concluded that the University was unreasonably delaying completion of the City's collection lines, and thus creating a health hazard. The Board of Regents, which had sole authority over such matters, had not approved the easement, service rates, or the plan for construction of the lines because there were legitimate objections on an engineering basis to the City's plans. Despite his awareness that Board approval was a prerequisite but had been denied, Mayor Sams directed the sewage contractor to complete the construction of a four-inch and a six-inch sewer line across University property and to connect these lines to the Uni-

versity's collection and treatment facility. Dr. Thomas instructed Dr. Decatur Rogers, the administrator in charge of the University's physical plant, to do "whatever was necessary" to prevent the City from running sewage through the completed lines. Accordingly, in May, 1978, under the personal supervision of Dr. Rogers, University personnel cut out and capped several sections of pipe in both lines.

Sams signed a complaint charging Dr. Thomas with committing a criminal offense by "coercing" Rogers to destroy City property. The complaint is signed "Eristus Sams, Mayor"; but the district court found that, because the City Council had not voted to authorize the mayor to issue the complaint, "Sams acted as a private citizen in swearing out his complaint although his signature included his governmental title." The district court also found that Sams acted with "personal animosity, malice, and a lack of good faith." Acting in his role as magistrate, Sams then issued a warrant for Thomas's arrest, based on the complaint that he had himself just signed. Pursuant to the warrant the Chief of Police arrested Thomas. Sams, as magistrate, set bond in the amount of $200, the maximum fine that could be exacted by the Municipal Court.

Thomas attempted to give a personal check as bond; but Sams, acting either as magistrate or municipal judge, refused to accept the check because he believed its payment would be stopped. After slightly over two hours detention, Thomas succeeded in posting the bond in cash and was released.

The district court concluded that the City's construction of the pipeline was a common law and criminal trespass

on the University's land.[2] The court added that it could also reasonably be regarded as an attempted theft of service.[3] The University's action in cutting the line was a reasonable attempt to prevent this attempted theft and "continued, egregious trespass."

[1, 2] The destruction of the property of a trespasser by the possessor of land is not actionable under Texas criminal laws.[4] In this situation the University might act to defend its rights "by any means short of a breach of the peace."[5] The prevention of imminent theft by the reasonable use of force is also justified, and is not a crime.[6]

Moreover, the court found, Sams lacked probable cause for the complaint, both because he lacked adequate reason to suspect that a crime had been committed by the president and because he lacked adequate knowledge of the president's role in cutting the lines to justify an arrest. The court found that Sams lacked judicial immunity because he acted in the clear absence of all jurisdiction. His acts could "not be fairly categorized as judicial acts," but on the contrary were "clearly the acts of a governmental executive officer or a complainant." The investigation and complaint were not brought to him originally in

---

2. Tex. Educ. Code Ann. § 51.204, Tex. Penal Code Ann. § 30.05.

3. Tex. Penal Code Ann. § 15.01, 31.04(a).

4. *Simmons v. State,* 156 Tex. Cr. R. 601, 245 S.W.2d 254 (1952); *Morgan v. State,* 99 Tex. Cr. R. 661, 271 S.W. 608 (1925); *Bray v. State,* 87 Tex. Cr. R. 146, 219 S.W. 1102 (1920); and *Farmer v. State,* 58 Tex. Cr. R. 171, 124 S.W. 925 (1910).

5. *McNeely v. State,* 50 Tex. Cr. R. 279, 96 S.W. 1083, 1084 (1906).

6. *Cf.* Tex. Penal Code Ann. § 9.41 (use of force against another to protect one's property).

his judicial capacity. "He went into the community and performed these non-judicial acts himself before reverting to his judicial role." Accordingly, the district court rendered judgment against Sams for $7,500 actual damages, $2,500 punitive damages, and $15,000 attorneys' fees. As already noted, the trial judge held the city not liable because it was "unwilling to impose liability upon local governments because of the strictly legal actions of their judicial officers."

II.

Judges may, and on occasion do, depart from their judicial roles and inflict grevious hurt on others. Often the allegations of misconduct by judges are hyperbolic and either untrue or unprovable; but sometimes, as here, a person who is a judge intentionally commits a mischievous act. Nevertheless, while courts are not blind to the human vices that may lurk behind the robe, they have struck society's balance in favor of judicial immunity. A wrong committed by a judge might on occasion be remedied by holding the judge a tortfeasor. Much graver harm would be done to the justice system and consequently to the social fabric, however, by requiring judges to account for the reasons why they took judicial action, and to absolve themselves from charges of improper motive or other impropriety. Absolute judicial immunity is an essential shield in a justice system that depends on its judges to "exercise their functions with independence and without fear of consequences,"[7] not an apologia for the errant behavior of judges who act injudiciously or

---

7. *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288, 294 (1967), *quoting Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349-50, 20 L.Ed. 646 (1871).

malevolently.[8] To provide the broad protection that these important policies require, the Supreme Court has ruled that absolute immunity extends to all judicial acts unless such acts fall clearly outside the judge's subject-matter jurisdiction. *Stump v. Sparkman,* 435 U.S. 349, 359-64, 98 S.Ct. 1099, 1106-08, 55 L.Ed.2d 331 (1978).[9]

[3, 4] All parties agree that Sams's acts as magistrate, including issuing the warrant and setting bond, are judicial acts for which he is absolutely immune from liability. We therefore turn our attention to Sams's acts in investigating the pipecutting, and in swearing out the complaint without probable cause and with malice. We apply this circuit's four-part test to determine whether these actions constituted judicial acts, and conclude that they do not: These acts were not part of a normal judicial function, but were plainly executive in nature; they did not center around any pending case, but instead initiated the case; they did not occur in the judge's chambers; and they did not involve Sams's official capacity as a judge. *See Harper v. Merckle,* 638 F.2d 848,

---

8. Other policies served by judicial immunity, in addition to the preservation of an independent judiciary, include the need to avoid vexatious litigation against judges and the need for finality in litigation. *See Harper v. Merckle,* 638 F.2d 848, 856 n. 10 (5th Cir. 1981), *cert. denied,* 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1982).

9. *Harper v. Merckle,* 638 F.2d *supra,* at 857-58; *Sparks v. Duval County Ranch Company Inc.,* 604 F.2d 976 (5th Cir. 1979) (en banc), *aff'd sub nom. Dennis v. Sparks,* 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Turner v. Raynes,* 611 F.2d 92 (5th Cir. 1980), *cert. denied,* 449 U.S. 900, 101 S.Ct. 269, 66 L.Ed.2d 129 (1980); *Brewer v. Blackwell,* 692 F.2d 387 (5th Cir. 1982); *Watson v. Interstate Fire & Cas. Co.,* 611 F.2d 120 (5th Cir. 1980); *Williams v. Rhoden,* 629 F.2d 1099, 1101 (5th Cir. 1980); *Henzel v. Gerstein,* 608 F.2d 654 (5th Cir. 1979); *Almon v. Sandlin,* 603 F.2d 503 (5th Cir. 1979); *Crowe v. Lucas,* 595 F.2d 985 (5th Cir. 1979).

858 (5th Cir. 1981), *cert. denied,* 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85 (1982); *McAlester v. Brown,* 469 F.2d 1280, 1282 (5th Cir. 1972); *Ammons v. Baldwin,* 705 F.2d 1445, 1447-48 (5th Cir. 1983). *See also Henzel v. Gerstein,* 608 F.2d 654 (5th Cir. 1979) (the "absence-of-jurisdiction" exception refers to situations in which the judge acts purely in a private and nonjudicial capacity). Sams's acts in initiating the proceedings that led to Thomas's arrest, therefore, are not cloaked in absolute immunity. When the same person "[wears] two hats," one as judge and the other as a city executive official, he may be liable for an arrest resulting from his acts as a city official. *Crowe v. Lucas,* 595 F.2d 985, 990 (5th Cir. 1979).

[5-8] Nonjudicial public officers of course are not required to err at their own risk; they are protected by an immunity, albeit in most cases a narrower one. *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1638, 40 L.Ed.2d 90 (1974). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396, 410 (1982). A public official may, however, be held liable if he violated constitutional or statutory rights that were clearly established at the time he acted such that a reasonably competent official should have then known the rules of law governing his conduct, *unless* the official pleads and proves in his defense extraordinary circumstances by virtue of which he neither knew nor should have known of the relevant legal standard. *Id.,* 457 U.S. at 819, 102 S.Ct. at 2739. While *Harlow*

adopted an exclusively objective test for imposing liability, it did not qualify an official's liability for injury resulting from deliberate and malicious acts that violate clearly established statutory or constitutional rights.[10] *Harlow v. Fitzgerald*, 457 U.S. at 818-819, 102 S.Ct. at 2739, 73 L.Ed.2d at 410-411. The district court's finding that Sams acted with such malice is sufficient to force him to face Thomas's allegations without the shield of immunity.[11]

Mayor Sams's reply is that he cannot be held liable under § 1983 because the nonjudicial acts of investigating the pipe-cutting and swearing out the warrant did not result in "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States" and indeed that those acts caused Dr.

---

10. Before *Harlow*, an official could be held liable under either an objective or a subjective standard. The subjective test imposed liability for actions performed "with malicious intention to cause a deprivation of constitutional rights or other injury to the plaintiff." *Bogard v. Cook*, 586 F.2d 399, 411 (5th Cir. 1978), *cert. denied*, 444 U.S. 883, 100 S.Ct. 173, 62 L.Ed.2d 113 (1979) (quoting *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 1000-01, 43 L.Ed.2d 214 (1975)).

11. Sams challenges both the trial court's conclusion that he reasonably should have known that the cutting of the pipes either was not a crime or was subject to a complete defense under Texas law, and the court's determination that he lacked probable cause to believe Thomas had instigated the episode. The court found, as a matter of fact amply supported by the record, including testimony from Sams himself, that Sams at all times was aware that the required Board approval had not been obtained. Sams has not demonstrated that the law of trespass in Texas, so far as it concerns this case, is so obscure that a reasonable person in Sam's position would not understand that the University was entirely justified in interdicting the pipes. Indeed, the evidence supports the court's conclusion that Sams either knew or recklessly maintained "self-serving" ignorance about the illegality of his actions. Because Sams either knew or should have known that no crime was being perpetrated by any University employee, it is irrelevant whether he had probable cause to suspect Thomas' involvement.

Thomas no injury at all. Whatever injury Dr. Thomas might have suffered, Sams argues, resulted from the immunized judicial acts of issuing the arrest warrant and setting bail.[12] Sams's theory thus is that those judicial acts constitute an intervening cause between his nonjudicial acts and Thomas's alleged injury. We conclude that Sams's theory is sound, but its application in this case is flawed.

[9-11] The first prerequisite to recovery under § 1983 is proof that the plaintiff has been deprived of a right "secured by the Constitution and laws of the United States." *Baker v. McCollan,* 443 U.S. 137, 139, 99 S.Ct. 2689, 2693-95, 61 L.Ed.2d 433 (1979) (detention pursuant to valid warrant did not amount to a deprivation without due process of law). The right to be free from illegal arrest plainly enjoys such protection. As we stated in *Smith v. Gonzales,*[13] however:

> Where an arrest is made under authority of a properly issued warrant, the arrest is simply not a false arrest. *Rodriguez v. Ritchey,* 556 F.2d 1185 (5th Cir. 1977) [(en banc)]. Such an arrest is not unconstitutional, and a complaint based on such an arrest is subject to dismissal for failure to state a claim. Id.; *Simon v. United States,* 644 F.2d 490 (5th Cir. 1981) (citing *Rodriguez*); see *Walker v. United States,* 471 F.Supp. 38, 40 (M.D. Fla. 1978):

---

12. Sams also challenges the district court's finding that Thomas had established all the elements of the common law action for malicious prosecution. Sams asserts, first, that Thomas never pleaded a pendent state law claim for malicious prosecution; and second, that such a claim must fail in any event because the criminal charge is still pending in state court and therefore has not been resolved in Thomas's favor. Because we uphold Thomas's claim under § 1983, we need not consider these issues.

13. 670 F.2d 522, 526 (5th Cir. 1982), *cert. denied,* 459 U.S. 1005, 103 S.Ct. 361, 74 L.Ed.2d 397 (1983).

In his concurring opinion in *Rodriguez,* Judge Hill cautioned that an officer who maliciously seeks to obtain a facially valid warrant or indictment should not be absolved of liability simply because he succeeded. 556 F.2d 1185, 1194-95 (5th Cir. 1977) (en banc) (Hill, J., concurring), *cert. denied,* 434 U.S. 1047, 98 S.Ct. 894, 54 L.Ed.2d 799 (1978). Nevertheless, we have extended the officer's shield further by holding in *Smith v. Gonzales* that even an officer who acted with malice in procuring the warrant or the indictment will not be liable if the facts supporting the warrant or indictment are put before an impartial intermediary such as a magistrate or a grand jury, for that intermediary's "independent" decision "breaks the causal chain and insulates the initiating party." 670 F.2d at 526 (citing *Rodriguez,* 556 F.2d at 1193). As the Supreme Court observed in *Baker v. McCollan,* a reasonable division of responsibility between executive and judicial officers is consistent with due process of law. 99 S.Ct. at 2695. *See also, Smith v. Gonzales,* 670 F.2d at 526.

[12] Sams did not choose to present the complaint to an impartial intermediary. He deliberately avoided doing so, despite the availability of state judges and justices of the peace who had authority to sign the warrant. Under these circumstances the issuance of the arrest warrant was not an intervening cause: There was no "independent decision" to break the causal chain and to insulate him as the initiating party. Sams acted with "personal animosity, malice, and a lack of good faith" in undertaking the acts that enabled him to take up his magistrate's pen and sign the warrant. He may not innoculate his conduct by that pen-stroke.[14]

---

14. At oral argument, counsel for Sams cited two recent cases to support his argument that no claim cognizable under § 1983 arose

Sams's status in signing the complaint has been variously characterized. The district court and both parties have from time to time described that status as executive, "quasi-executive," and as that of a private citizen.[15] Any finding that Sams acted other than in his official capacity

---

from Sams's actions in investigating the pipe-cutting and swearing out the complaint: *Ammons v. Baldwin*, 705 F.2d 1445 (5th Cir. 1983), and *Nesmith v. Taylor*, 715 F.2d 194 (5th Cir. 1983) (per curiam). In *Ammons*, reviewing under the abuse-of-discretion standard appropriate for an appeal from a denial of a motion for relief from judgment, we held that all of the acts complained of, except one, constituted judicial acts under *Harper v. Merckle, supra.* 705 F.2d at 1447. The defendant judge's nonjudicial act—threatening physical abuse—did not cause an actionable injury because the plaintiff was never placed in imminent fear of bodily harm. We therefore held that the plaintiff's one claim that was not barred by judicial immunity did not rise to the "minimal level required to invoke federal jurisdiction." *Id.* at 1448. In *Nesmith*, we held that a plaintiff legitimately under compulsion to appear before a court on one count could not state a claim for deprivation of liberty if the second count was based on a complaint maliciously sworn without probable cause. We concluded that the additional, arguably invalid, reason to appear before the court did not diminish the plaintiff's liberty any more than an "additional lock on a jailhouse door" further diminished the liberty of its occupants. 715 F.2d at 196.

Plainly, neither case governs the situation before us. Thomas has alleged more than a de minimis injury from Sams' nonjudicial acts. And those acts did not produce a redundant compulsion to appear; as we have concluded above, those acts caused the deprivation of Thomas' liberty.

15. Like the district court, counsel for Thomas in oral argument characterized Sams's conduct in various terms. At one point he conceded that the district court's finding that Sams acted as an individual in swearing out the complaint was not clearly erroneous. Were the concession correct, it would vitiate the basis for any judgment against Sams or the City. We do not consider Thomas bound by such an obviously ill-considered remark made by counsel in oral argument, when it has the effect of completely destroying the plaintiff's otherwise meritorious claim. *Cf. New Amsterdam Casualty Co. v. Waller*, 323 F.2d 20, 25 (4th Cir. 1963), *cert. denied*, 376 U.S. 963, 84 S.Ct. 1124, 11 L.Ed.2d 981 (1964) ("[A] party ought not and does not lose his right when his counsel, however formally, advances an erroneous legal theory. If, on the facts disclosed, the party is entitled to some relief, it is the duty of the court to award it.").

in signing the complaint is clearly in error. Sams signed the complaint as mayor. He did so to prevent interference with the construction that he, as mayor, had ordered and supervised. Indeed, if he were not acting as a public official in doing so, there would be no basis for the district court to have held him personally liable under § 1983 for his actions would not have been performed "under color of" state law. Moreover, in supplemental findings of fact, made in ruling on Sams's motion for a new trial or, alternatively, for amendment of findings of fact and conclusions of law, the district court stated that Sams's acts, including his swearing out of a complaint, were "executive acts" of misguided law enforcement.

III.

[13] A municipality is liable for damages under § 1983 "when execution of [the] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Monell v. Department of Social Services,* 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed. 2d 611, 638 (1978). Sitting en banc, we recently elaborated the concept of policymaking authority in *Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir. 1984) (en banc). A city official's edicts or acts do not render the city liable even in a case in which a fact finder might fairly say that the edicts or acts were official policy. "Liability must rest on official policy, meaning the city government's policy, and not on the policy of an individual official. The policy is that of the city, however, where it is made by an official under authority to do so given by the governing authority." *Id.* at 769. Culpable acts or policy are attributable to the governing body only

when made or done by an official to which the governing body had given authority to act or to make policy. We then further defined policy-making authority as

> more than discretion, and it is far more than the final say-so, as a matter of practice, on what water main will be replaced today and whether a building meets city construction standards. City policymakers not only govern conduct; they decide the goals for a particular city function and devise the means of achieving those goals. Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance. The governing body retains the prerogative of the purse and final legal control by which it may limit or revoke the authority of the official.

Id.

[14] "The issue of authorization, approval or encouragement is generally one of fact, not law." *Turpin v. Mailet,* 619 F.2d 196, 200-01 (2d Cir. 1980), *cert. denied sub nom. Turpin v. City of West Haven,* 449 U.S. 1016, 101 S.Ct. 577, 66 L.Ed.2d 475 (1980). *See also Bowen v. Watkins,* 669 F.2d 979, 990 (5th Cir. 1982). Thomas asserts that the court's finding that Sam's acts did not represent City policy is clearly erroneous. We agree.

The record contains uncontradicted evidence that the City Council of Prairie View entrusted the entire conduct of the installation of the sewage lines and the resultant pipeline dispute to Mayor Sams. He was given the final authority to define the City's goals with respect to the sewage treatment project and to choose the means of achieving those goals. Sams testified that he had reported

regularly to the Council on the progress of the pipeline; that they knew it was crossing University land; and that he had sent the Chief of Police to the University to supervise the operation and, inferentially, to prevent interference with it.

After several interruptions due to the ejections of the City's crew from University land, Sams announced completion of the line at a regular Monday night Council meeting. Subsequently, the University warned the City by letters that the line would be intersected if it was not removed. After the lines had been cut and capped, Jack Echols, the Council member who was Mayor Pro Tem, rushed to report the "offense" to the Mayor. Although Mayor Sams denied at trial that Councilman Echols knew that Sams planned to arrest anyone, the councilman's written statement to the Mayor shows that he expected police action on the "offense." Echols's actions indicated that the Council had not only delegated authority to the Mayor but knew what he was doing. They indicate further that at least one Council member thought Sams had authority to act and was urging him to do so.

That the Council did not expressly authorize Sams by resolution to arrest the University president does not, under these circumstances, immunize the City. The City had delegated to Sams, as its mayor, the power to take all acts he deemed necessary to complete the sewer line. It had, in *Bennett's* words, "by its conduct or practice encourage[d] or acknowledge[d] the agent in a policymaking role." It had "impliedly acknowledge[d] that the . . . [Mayor] act[ed] in lieu of the governing body" to have Thomas arrested.

To the City of Prairie View this sewer project, and the ensuing dispute, was more than merely a routine question

of "what water main will be replaced today." The City was engaged in the development of a sewage treatment facility that affected the entire municipality. The application for a grant, the conferences with University officials, letting the contract, and supervising construction had extended over a period of years. The Council had manifested a great interest in the project and the Mayor had kept it informed of any progress. Most of the off-campus residents were without sewage facilities, and the Mayor regarded the situation as posing a serious threat to their health. Under these circumstances, the completion of the pipeline at the expense of the University's property rights, and notwithstanding lawful opposition by the University president, clearly became a goal of the municipality itself, as defined and implemented by its authorized representative Sams. Thomas's arrest was in accordance with City policy, because it was caused by an officer whose acts represented that policy.

IV.

[15, 16] The district court awarded Thomas attorneys' fees of $15,000 after fully considering the factors dictated by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974). The computation of such an award is committed to the sound discretion of the trial judge, and we review it only for errors of law and such gross miscalculations as would indicate discretion had been distorted. *Welch v. University of Texas and its Marine Science Institute*, 659 F.2d 531, 535 (5th Cir. 1981); *Thomas v. City of New Orleans*, 687 F.2d 80, 84 (5th Cir. 1982); *Copper Liquor Store, Inc. v. Adolph Coors Co.*, 624 F.2d 575 (5th Cir. 1980) (*Coors* II); *Copper Liquor Store, Inc. v. Adolph Coors Co.*, 684 F.2d 1087

(5th Cir. 1982) (*Coors* III). The district judge here weighed all factors, including success and failure on the various issues in the case.[16] The court discounted the award, however, for time spent pursuing the City of Prairie View. Because Thomas has prevailed against the City, that discount should be eliminated. In addition, Thomas is entitled to attorneys' fees for this appeal.

For these reasons the judgment against Eristus Sams is AFFIRMED. The case is REMANDED for entry of judgment against the City of Prairie View as a defendant, jointly and in solido with Sams, and for determination of attorneys' fees.

---

16. Counsel cited, at oral argument, a case currently pending before the Supreme Court, *Pulliam v. Burke*, 82-1432, *cert. granted*, _____U.S._____, 103 S.Ct. 1873, 76 L.Ed.2d 806 (1983). That case presents the issue whether a magistrate's judicial immunity bars an award of attorney's fees to a prevailing party under 42 U.S.C. § 1988, the Civil Rights Attorneys' Fees Awards Act of 1976. The Fourth Circuit held that it did not, *sub nom. Allen v. Burke*, 690 F.2d 376, 378-79 (4th Cir. 1982). The present case raises no such question, for unlike the defendant in *Burke*, Sams's liability arises from non-judicial acts.

APPENDIX B

Dr. Alvin I. THOMAS, Plaintiff-Appellee
Cross-Appellant,

v.

Eristus SAMS, Individually and As Mayor
of Prairie View, Defendant-Appellant,

and

City of Prairie View,
Defendant-Cross Appellee.

No. 82-2359.

United States Court of Appeals,
Fifth Circuit.

September 17, 1984.

Appeals from the United States District Court for the Southern District of Texas.

ON PETTION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

Before RUBIN and RANDALL, Circuit Judges, and MITCHELL*, District Judge.

ALVIN B. RUBIN, Circuit Judge:

The petition of Mayor Eristus Sams for rehearing is denied because the evidence clearly shows that Sam's acts

* District Judge of the Eastern District of Louisiana, sitting by designation.

in causing Thomas's arrest were committed "under color of state law" for the purposes of § 1983. Although the City has not petitioned for rehearing of the court's decision, we note that the unlawful arrest was the execution of a decision made by an official to whom the City's lawmakers impliedly had delegated authority to see that the sewer line was completed, including authority to eliminate interference with its completion by means that included arrest of persons who interfered with the project.

The circumstances attending the project, the events surrounding the arrests, and the official relationships among the Prairie View officers involved combine to compel the conclusion that Thomas's rights were violated pursuant to city policy.

Completion of the sewer line had become urgent because the state health department had notified the City that its lack of sewage treatment faclities constituted a health hazard. The sewer project, which took six years to complete, was therefore of major importance to the small community of Prairie View.

On the Friday night preceding the Thomas episode, the five-member council held a special meeting, at which Mayor Sams reported that the line would be tested by the following Monday. The council members knew the line was being laid on University property. After having been warned by the University that the City was not authorized to lay a line on its property and that the University's maintenance official intended to cut the line, the Mayor had directed the Chief of Police to prevent any interruption to completion of the project and had sent the Chief to University property three times to prevent any interference with the contractor's work.

On the Saturday before the test was to be made, the University cut the unauthorized line. Jack W. Echols, a councilman and the Mayor pro-tem, reported the matter to Mayor Sims. Echols also signed a letter addressed to Mayor Sams, to serve as the basis for the arrest warrant later issued. That letter states, "As a duly elected City Official and appointed Mayor Pro-Tem by the City Council . . . I hereby wish to report the following incident. . . ." It then relates details of the cutting of the line by University employees. The letter also states that Echols had "contacted" the Chief of Police and reported the University's activity, and that, after the Chief of Police had arrived at the scene, "I hurriedly left the scene and sped in my car to the Exxon Service Station . . . operated by Councilman T. R. Lawson, where an attempt was made to contact the Mayor *to officially report the offense.*" (Emphasis added.) Thereafter, Mayor Sams, who was also Magistrate Sams, the City's judicial officer, presented the affidavit to himself, as Magistrate, and caused the arrest of President Thomas. Before Thomas was arrested, Mayor Sams had caused the arrest and jailing of the vice-president of the University, Decatur Rogers.

Mayor Sams had been put in full control of the sewer-line project by the Council. Moreover, he was not entirely dependent on the Council for policymaking authority. As Mayor, he derived some power to make policy directly from the electorate: He was the "chief executive" of the city, and was required to "be active at all times in causing the laws and ordinances of said city to be duly executed and put in force."[1] In addition to the five Council mem-

---

1. Tex. Rev. Civ. Stat. Ann., art. 994 (Vernon 1983); *cf. id.*, art. 996 (powers of mayor). *See Bennett v. City of Slidell*, 728 F.2d 762, 766 n. 2 (5th Cir. 1984) (en banc) (distinguishing *Familias*

bers and Sams, the City employed only six other individuals including the Chief of Police.

In sum the facts are thus: The line was laid across University property without University consent, but with the City Council's knowledge and at least tacit approval. The warrant was signed, "Eristus Sams, Mayor." The arrest was prompted by a report from a councilman who was Mayor Pro-Tem (with apparent approval of another councilman, T. R. Lawson), to the City's chief executive, who prepared and presented an arrest warrant to himself in his capacity as the city's chief judicial officer and who caused it to be served by the City's chief law enforcement officer.

Viewing the record as a whole, and not a single item of it in isolation, we are left with the definite and firm conviction that the Mayor was "the official to whom the law makers [had] delegated policymaking authority" to decide whether a person who interrupted completion of the line would be arrested. *Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir. 1984). As evidenced by the acts of Mayor Pro-Tem Echols, who described the University officials' acts as an "offense," the Council had delegated this authority officially, albeit tacitly. And his decision to have Thomas arrested plainly was executed "under color of state law."

No member of the panel or Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc,[2] the suggestion for Rehearing En Banc is also DENIED.

Unidas v. Briscoe, 619 F.2d 391 (5th Cir. 1980), in which the official received his policymaking authority by virtue of the office to which he was elected).

2. Federal Rules of Appellate Procedure and Local Rule 35.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-1054

DR. ALVIN I. THOMAS

v.

ERISTUS SAMS, B. T. MORGAN and
THE CITY OF PRAIRIE VIEW

(Filed May 21, 1983)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came to trial before the Court with all parties appearing and announcing ready. Plaintiff alleged a cause of action under 42 U.S.C. § 1983, claiming that his rights under five amendments to the Constitution were violated by the Defendants. The crux of the complaint derived from the arrest of the Plaintiff on May 31, 1978. At the conclusion of trial the Court found Defendant Eristus Sams personally liable to Plaintiff in the amount of $10,000. The claims against the other Defendants were dismissed on the merits.

Findings of Fact

1. The three principals in this suit are Dr. Alvin Thomas, the President of Prairie View A & M University, Mr. Sams, the Mayor of the incorporated City of Prairie

View which borders the University, and Defendant Booker T. Morgan, the Chief of Police of the City.

2. By 1978 Plaintiff and Sams had become political antagonists in the small Prairie View community. On the witness stand Plaintiff stated that he, personally, and his administration of the University, generally, were used by Sams as local, political scapegoats. At trial Sams agreed with the statement that Plaintiff was a "traitor to the cause." The "cause" being political rights, particularly voting rights, for the students of Prairie View A & M. Sams' opinion was derived from Plaintiff's failure in 1974 to support specific voting rights litigation which had been pursued by Sams. After that "part[ing of] company" (Sams Deposition at 80) in 1974, Plaintiff and Sams disdained a friendship which had begun in 1948. In fact, in reference to the proposed construction of a sewer project to be carried out through cooperation between the City and the University, which was a central subject in this case, Sams testified that he did not have even one conversation with the Plaintiff concerning this project in the six years between 1972 and May 31, 1978, the date when the Plaintiff was arrested. The Court finds that substantial personal animosity existed between these two parties.

3. This personal animosity eventually intruded upon Mr. Sams' attempts to perform his job. In the early part of 1972 the City and the Board of Directors of the Texas A & M University System, the governing board of Prairie View A & M, had agreed to a joint treatment plant for the sewage of the City and the University in order to qualify for certain available federal funds. Accordingly, the Board of Directors adopted a resolution agreeing to treatment of the municipal sewage at the University's

treatment plant with the understanding that the City would construct and maintain sewer lines across the school's land to gain access to the plant. *See* Plaintiff's Exhibit 5. This agreement was executory according to the interpretation and understanding of all parties. Sams admitted at trial that he knew at all times that the City could not construct its pipeline until service rates were agreed upon and easements were approved by the Board of Directors. As a matter of law no other interpretation was possible since no easement on University land may be granted without the Board's permission. TEX. EDUC. CODE ANN. §§ 85.26(e), 87.102.

In the fall of 1977, construction had not been started on the sewer line due to a variety of reasons. At that time Mr. White, the City's construction engineer, met with the University's engineering staff to gain approval of the City's proposed pipeline. This proposal was rejected, and although there were many subsequent meetings the City failed to submit an acceptable engineering proposal. These proposals were rejected for several important, legitimate reasons. First, the City proposed to join its input line onto the existing pipeline of the school. This meant that the party responsible for a future possible stoppage could not be identified and the City's usage could not be measured by any existing sewage meter. Further, the City's plans failed to provide for manholes at points where the pipeline made right-hand turns, failed to show that the pipe was protected from severe weather freezing, and failed to show that the pipe was protected from damage or stoppage at one point where it crossed a ravine. The testimony of Dr. Rogers was uncontradicted and established that these problems were significant engineering concerns. Perhaps of equal concern was the

fact that the proposed pipeline passed directly underneath the future site of the University Chapel and within a few feet of the school's existing football stadium. Accordingly, no proposed plan was approved by either the University or the System Board of Directors until after this suit was filed.

5. Despite his knowledge that approval was necessary but had been denied, Mayor Sams ordered construction to begin according to a plan which called for the digging of a trench underneath the future site of the University Chapel. Construction was started on University land without notice in May, 1978. Upon discovery of the work in progress various University officials ordered the workers off the state property. The workers were ejected at least twice. Work was halted once for one day and another time for approximately one week. After each interruption, however, the City's workmen re-entered state property and continued excavation. Subsequent to one interruption Mr. White reopened negotiation with the University staff, and admitted that he knew permission was required before construction should begin, but related that Mayor Sams had ordered him to proceed regardless of the lack of approval. At another confrontation Mayor Sams was present on University property when City workers were ejected. After initially maintaining that he would not vacate the grounds, Sams and his workmen withdrew their machinery after the Police Chief of the University read them the provision of the Texas Penal Code relating to criminal trespass. Immediately thereafter, however, Sams surreptitiously ordered the workers back onto school land to complete the project. The City crew hooked onto the University sewer system on or about May 22, 1978.

6. After learning of this fact, Dr. Rogers, who was designated by the President to oversee the University's participation in the project, demanded that Mr. White disconnect the pipeline and refrain from using the school's sewer system. When this was not done within a few days Dr. Rogers had his workmen sever the City's two parallel pipelines on May 27th and cap the ends of the pipes at the section. The sections which were removed were approximately two feet long. Several witnesses, including Mayor Pro Tem Jack Nichols, identified Rogers at the work site. Nichols wrote and submitted an "eyewitness account" of the incident to Mayor Sams. Subsequently, Rogers was arrested on May 30, 1978, at his campus office by Defendant Morgan who acted under the orders of Sams.

7. Under interrogation by Sams and Morgan that same day Rogers stated generally, apparently in response to the question why he cut the pipes, that, "I had a job to do just like you have." On the basis of this information Sams swore a complaint against Thomas for ordering the cutting of the two pipes. Plaintiff's Exhibit 4. Relying on his complaint Sams issued a warrant for Thomas' arrest for "Coercion of Employees to Destroy City & Public Property . . ." Plaintiff's Exhibit 13. Texas law authorizes mayors to act as magistrates and issue arrest warrants. TEX. CODE CRIM. PRO. ANN. art. 2.09, 15.03 (b); *see* TEX. EDUC. CODE ANN. § 51.208.

8. Armed with the warrant Morgan proceeded the next day to the President's office in the Administration Building at the University. He arrested the Plaintiff and escorted him through the front door of the building to the marked City police car which was parked in the front driveway approximately fifty yards from the building door.

This proceeding was witnessed by many people including students, faculty, and staff. Several witnesses testified concerning the shock they felt in seeing a respected member of the Texas educational community handled in such a fashion. Thomas testified that Morgan would not permit him to surrender himself to City officials or proceed into town in his private automobile. Upon arriving at City Hall, Plaintiff was booked in a comparatively large public room again in the presence of several young people. Not surprisingly, the news media became aware of this incident. Mayor Sams' description of the arrest was disseminated widely in the State of Texas. The Court finds that one's reputation in the community is extremely important to a person like Dr. Thomas who is the head of an institution of higher education and is a role model for present and prospective students. Plaintiff's reputation was damaged by this arrest. Additionally, both the Plaintiff and Ms. Matlock, another witness, testified that Plaintiff was psychologically and physiologically affected by the arrest and its aftermath.

9. Any finding of fact which may be deemed a conclusion of law is hereby adopted as such.

Conclusions of Law

1. The Court has jurisdiction over the subject matter of this suit. 28 U.S.C. § 1343(3).

Relative Rights of University and City

2. The intrusion of the City by its workmen, officials, and pipeline was a common law and criminal trespass upon state land. TEX. EDUC. CODE ANN. § 51.204, TEX. PENAL CODE ANN. § 30.05. It could also reasonably be

regarded as attempted theft of service. TEX. PENAL CODE ANN. §§ 15.01, 31.04(a).

3. The Court concludes that the school administration took reasonable action to prevent this attempted theft and continued, egregious trespass. The destruction of the property of a trespasser by the possessor of land is not actionable under the criminal laws of the State of Texas. *Simmons v. State,* 245 S.W.2d 254 (Tex. Crim. App. 1952); *Morgan v. State,* 271 S.W. 608 (Tex. Crim. App. 1925); *Bray v. State,* 219 S.W. 1102 (Tex. Crim. App. 1920); and *Farmer v. State,* 124 S.W. 925 (Tex. Crim. App. 1910). *See* TEX. PENAL CODE ANN. § 28.03 (a) (lack of consent by the "owner" is an element of the offense alleged by Sams). In this situation the University could act to defend its rights "by any means short of a breach of the peace." *McNelly v. State,* 96 S.W. 1083 (Tex. Crim. App. 1906). The prevention of imminent theft by the reasonable use of force is also justified, and is not a crime. *Cf.* TEX. PENAL CODE ANN. § 9.41 (use of force against another to protect one's property).

Defendant Sams

4. Since the cutting of the two pipes was not a crime under TEX. PENAL CODE ANN. §§ 7.02, 28.03, and was subject to a complete defense of justification, Sams was without probable cause to suspect a crime had been committed by *any* University official.

5. Additionally, he was without probable cause in swearing a complaint specifically against Plaintiff since at the time he did so he was without adequate knowledge to justify an arrest, *i.e.,* that the facts and circumstances known to him were "sufficient to warrant a prudent

person, or one of reasonable caution, [to believe] in the circumstances shown, that the suspect has committed . . . an offense." *Michigan v. De Fillippo,* 443 U.S. 31, 37 (1979) Sams maintained at trial that he swore out the complaint based on section 7.02 of the Penal Code, apparently either subsection (a)(2) or (a)(3). But at the time he acted, Sams' relevant knowledge was limited to the meager statement secured during his interrogation of Rogers (*See* Finding of Fact 7), and his knowledge that Plaintiff was the chief executive officer of the University and did not approve of the City's construction. This evidence and that of the actual cutting of the pipes was the sole evidence of probative value that was presented to the Court on the issue of Sams' probable cause to suspect an offense by Plaintiff. Even if it could be concluded that cutting the pipes constituted an offense, Sams did not have sufficient information at the time to reasonably believe under section 7.02(a) that Thomas was responsible or that he had acted "with intent to promote or assist the commission of the offense," or that he had solicited, encouraged, directed, aided or attempted to aid Rogers in the same. Sams could not have reasonably believed that Plaintiff had failed "to make a reasonable effort to prevent commission of the offense." (Of course at trial it was shown that the Plaintiff did not expect or know that the pipes would be cut until after the fact). Sams simply had no information concerning the above elements of the alleged offense. To establish the existence of probable cause an actor must make a showing of knowledge, *i.e.,* a showing of more "than mere suspicion" at the time he acted. *Wong Sun v. United States,* 371 U.S. 471, 479 (1963). Sams was without probable cause to order the arrest of Rogers or Plaintiff.

6. Since Plaintiff was arrested without probable cause, he was deprived of the rights under the fourth and fourteenth amendments. *Beck v. Ohio,* 379 U.S. 89 (1964). There was no violation of Plaintiff's first amendment rights, however. Thomas would have been arrested by instigation of Sams even if those two individuals had not disagreed earlier concerning the means to achieve voting rights for students. *See Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274, 287 (1977). Similarly, in causing the arrest of Plaintiff, Sams was not shown to be substantially motivated by a desire to muzzle Thomas' exercise of the right of free speech. Sams was concerned with Plaintiff's restraining actions, not his words.

7. Defendant Sams is not judicially immune from liability under 42 U.S.C. § 1983 for his role in the deprivation of Plaintiff's fourth and fourteenth amendment rights. In *Stump v. Sparkman,* 435 U.S. 349 (1978) the Supreme Court delineated three areas of inquiry to determine whether an individual should be entitled to judicial immunity. The three inquiries concern whether the judge "acted in the 'clear absence of all jurisdiction,' " and if he did not, whether the acts were "judicial acts," meaning, first, they were those of the type "normally performed by a judge," and second, were executed "in his capacity as a . . . [j]udge." *Id.* at 357, 362. In this case Sams sent the Chief of Police of the City to investigate the cutting and later to arrest Rogers, he personally interrogated Rogers, and he subsequently originated a complaint signed by the "Mayor". The Court concludes that these acts could not be fairly categorized as judicial acts under the above guides, but on the contrary were clearly the acts of a governmental executive officer, or a com-

plainant. *Harper v. Merckle,* 638 F.2d 848 (5th Cir. 1981), *cert. denied,* ____U.S.____, 50 U.S.L.W. 3245 (1981); and *Crowe v. Lucas,* 595 F.2d 985 (5th Cir. 1979). The investigative information and complaint were not brought to him originally in his judicial capacity. He went into the community and performed these non-judicial acts himself before reverting to his judicial role. None of Sams' acts in this incident were those of a legislator. *Cf. Hernandez v. City of Lafayette,* 643 F.2d 1188 (5th Cir. 1981), *appeal dismissed,* ____U.S.____, 50 U.S.L.W. 3570 (1982) (legislative immunity).

8. Whether Sams swore out the complaint as a private citizen or mayor it is clear that he is entitled to no greater protection than the qualified immunity which was established in *Wood v. Strickland,* 420 U.S. 308 (1975). The Court concludes that in initiating legal process and swearing out the complaint Sams "reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [individual] affected." *Id.* at 322. The constsitutional right which prohibits arrest without probable cause is so well established in this nation that it requires no further discussion. A reasonable person in the position of Mr. Sams would also have realized, given his knowledge at the time he acted, that he did not have probable cause to suspect Thomas of the offense for which he was charged. The same may be said for the reasonableness of suspecting that an offense had been committed by any University employee. *See* Conclusion of Law 4. Sams had repeatedly retreated from state land when so ordered by University officials. Under these circumstances Defendant Sams reasonably should have known that he was without legal right to arrest those who had lawfully ejected him. He

admitted at trial that he was not sure of the charge he brought and did not know which law had supposedly been violated. The Court concludes that given this state of mind a reasonable person would have concluded that an arrest would be unconstsitutional or at the very least that it was highly likely to be unconstitutional. Sams had been Mayor and Magistrate since 1972. Despite his self-professed legal doubts the Defendant initiated legal proceedings without consulting the City Attorney. Even if it is assumed that Sams did not know beyond doubt of the lllegality of his actions, the reckless retention by a person of self-serving ignorance cannot be accepted as the basis for immunity from liability for violation of another's constitutional rights. The Court concludes that Sams acted with personal animosity, malice and a lack of good faith. He was primarily concerned with forcing acceptance of the City's pipeline proposal upon the University without its approval even though he admitted by word and deed that he was without legal right to do so. There is little doubt that Sams maliciously intended to cause "other injury" to the Plaintiff. *Id.* at 322.

9. The Court does not reach and does not express an opinion concerning Plaintiff's additional argument that Sams could not have acted lawfully in any of the actions he took in this matter because he was not a neutral and detached magistrate under the fourth amendment holdings of the Supreme Court. *See, e.g., Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319 (1979). This Court holds only that Sams' activities in investigating the alleged offense and swearing out the complaint make him liable under the civil rights statute. Since the case can be disposed on statutory grounds it is unnecessary and inappropriate to consider the additional constitutional claim of the Plaintiff. Simi-

larly, it is unnecessary to determine the constitutionality of the Texas laws which apparently allow one person (a mayor) to act in the same case as both the "impartial" magistrate and the investigating officer.

10. Even if it assumed that Sams' magisterial acts dealing with the issuance of the arrest warrant were immune, this does not insulate him from liability for his earlier non-magisterial acts. *See Baskin v. Parker,* 602 F.2d 1205, 1207 (5th Cir. 1979). First, as discussed above, those earlier acts were non-judicial in character and he is not immune from liability under the qualified or absolute doctrines. Second, the participation in, and ratification of illegal activities by a judicially immune person (Magistrate Sams) does not protect a non-immune defendant (Sams) from liability under section 1983. *Dennis v. Sparks,* 449 U.S. 24 (1980); *Harper v. Merckle, supra;* and *Crowe v. Lucas, supra.* Third, even if other common law defenses beyond simple "immunity" are held to be available to a defendant in a 1983 action, a subject upon which the Court expresses no opinion, Sams still is without a defense since the Court finds that Plaintiff has proven all elements of the common law action of malicious prosecution, *i.e.,* not even the common law provides a defense. *See Rodriguez v. Ritchey,* 556 F.2d 1185, 1193 (5th Cir. 1977), *cert denied,* 434 U.S. 104 (1978); and RESTATEMENT (SECOND) OF TORTS §§ 653-673 (1976).

Defendant Morgan

11. Contrary to the claims of Plaintiff, trespass and other violations of state law are not actionable under 42 U.S.C. § 1983. *Baker v. McCollan,* 443 U.S. 137, 142-46 (1979). Under the facts of this case Morgan is conceivably liable only for the arrest of Thomas without

probable cause. the arrest itself was conducted reasonably even though it was to some extent embarrassing.

12. But under the standard enunciated in *Michigan v. De Fillippo, supra,* discussed in Conclusion of Law 5, Morgan had reason to assume that there was probable cause to suspect that Plaintiff had committed an offense. "A prudent person, or one of reasonable caution" is justified in depending upon the probable cause determination of a magistrate. This is exactly the holding of *Turner v. Raynes,* 611 F.2d 92, 93 (5th Cir. 1980) (arrest warrant was equivalent to the defense of "probable cause").

In *Whiteley v. Warden,* 401 U.S. 560, 568 (1971), the Supreme Court held, just as has been held here, that there was no probable cause for arrest but notwithstanding noted, "[w]e do not, of course, question that the Laramie police are entitled to act [apparently arrest] on the strength of the radio bulletin [which advised of the existence of an arrest warrant]." The Court concludes that Plaintiff failed to show that Morgan acted in other than good faith under the *Wood v. Strickland* standard in executing the warrant. He relied upon a warrant which was facially valid. *See* RESTATEMENT (SECOND) OF TORTS §§123, 124 (1964).

13. The Court is of the opinion, however, that even if it could be inferred that Defendant Morgan acted with knowledge that facts were insufficient to support the magistrate's determination of probable cause when he executed the warrant, he still should not be liable in damages. At least liability should not attach when there is no showing that he knew that the facts upon which the issuance of the warrant was based were false or misleading. There was absolutely no showing in this case that

Morgan knew of any false or misleading facts which were considered by the magistrate in making his warrant determination. In this setting the common law defenses of arresting officers should be preserved. *See Rodriguez v. Ritchey, supra* at 1193 (arresting officer who holds a warrant is not liable for false arrest or imprisonment); *Pennsylvania v. Sincavage,* 439 F.2d 1133 (3d Cir. 1971) (no liability under section 1983 for search by officer with warrant); and RESTATEMENT (SECOND) OF TORTS §§122, 653, 682, Comments (1964 & 1976) (no liability unless the actor has initiated the malicious action).

14. The law of Texas requires police officers such as Morgan to execute arrest warrants, and punishes any willful failure to do so. TEX. CODE CRIM. PRO. ANN. art. 2.13, 2.16. It would be fundamentally unfair if the law required a police officer who was only executing a warrant to choose between punishment for dereliction of duty on one hand and liability for civil rights damages on the other. A rule which would mandate that an officer must go behind the warrant and re-investigate the magistrate's determination of probable cause is impractical and logically inconsistent. Such a rule would greatly impede the operation of the criminal justice system which presently designates a few officers (magistrates) to hear evidence of probable cause and many police officers to rely and act upon such determinations wherever and whenever a suspect may be found. The impairment of the efficient administration of justice would be extensive if every peace officer were required to become a magistrate, and personally satisfy himself concerning his legal position before risking action. A judge is granted absolute immunity in order to "be free to act upon his own convic-

tions, without apprehension of personal consequences to himself" so that he may resolve "[c]ontroversies involving not merely great pecuniary interests, but the liberty and character of the parties, [which] consequently excit[e] the deepest feelings." *Bradley v. Fisher,* 13 Wall 335, 347-48 (1871). Since a judicial decision without corresponding execution settles no case or controversy between real parties, it is not clear how "independence without which no judiciary can either be respectable or useful" (*Id.* at 347) can be achieved unless those who execute judicial decisions are given immunity comparable to those who make those decisions.

15. The Court concludes that an officer who is acting in a non-discretionary role in serving a facially valid arrest warrant is entitled to derivative immunity for all reasonable actions taken in conjunction with service. This grant of immunity is justified because a citizen need not fear a policeman's expression of any malice he may feel, since that officer's discretion in making an arrest is sufficiently restrained by his narrow privilege of arrest and by the legal sanctions which exist to insure that proper treatment is extended to prisoners. *C.f. Butz v. Economou,* 438 U.S. 478, 512 (1978) (the Court identified additional factors which exist to lessen the likelihood that citizens will need to sue various other judicially immune persons).

16. In *Baker v. McCollan,* 443 U.S. 137 (1979), the Court held that a sheriff who imprisoned an individual under the authority of a valid warrant was not required to make his own investigation of the grounds for detention even in the face of the prisoner's repeated complaints of mistaken identity which were received with knowledge on the part of the authorities that the identifying instrument, a driver's license, was probably altered. *Id.* at 150.

Although the Court found that there had been probable cause for the arrest, the reason for this determination was not explained except by the statements, "respondent was arrested pursuant to a facially valid warrant," *Id.* at 143, and his arrest conformed "for purposes of our decision" to the Constitution. *Id.* at 144. In holding the sheriff not liable under 42 U.S.C. § 1983, the Court said, "Given the requiremen[t] that arrest be made only on probable cause . . . we do not think a sheriff executing an arrest warrant is required by the Constitution to investigate independently every claim of innocence, whether the claim is based on . . . a defense [of] lack of requisite intent." *Id.* at 145-46. This conclusion applies with nearly equal force to this section 1983 action.

City of Prairie View

17. As was the case with Defendant Morgan, the City can be held liable under 42 U.S.C. § 1983 only for violations of Plaintiff's federal statutory or constitutional rights. *Baker v. McCollan, supra.* Although consideration of collateral conduct may be relevant to a determination of immunity or "policy or custom" it would be impermissible to hold a local government liable for violations of state law. Consequently, the City is not liable for Sams' pattern of trespass and refusal to conform to University requirements even if those actions constituted the official policy of the City.

18. The City would be liable only if its routine official policy included the arrest of intervenors, or if Sams' "edicts or acts may fairly be said to represent official policy." *Monnell v. Department of Social Services,* 436 U.S. 658, 694 (1978). There was no showing that the City had arrested anyone to further any governmental

program other than a general program of good law and order. A plan to arrest, or the actual fact of arrest was not ratified or approved by the City Council. *Cf. Owen v. City of Independence,* 445 U.S. 622 (1980) (statements of one Council member were effectively ratified by the subsequent votes and actions of the Council). No official vote was taken by City Council nor was there a showing that a majority of the Council was even aware of or supported Sams' actions. Finally, the critical act which established Sams' liability was his swearing out of the complaint. But this action could have been taken by any complaining citizen, not just the Mayor. Sams' mayoral position did not enlarge to any extent whatsoever his power to swear out a complaint. While the official policy of the City was probably to construct the pipeline, the Court concludes that there was no showing that this policy extended to the arrest of those who opposed construction. Sams acted as a private citizen in swearing out his complaint although his signature included his governmental title.

19. The Court is unwilling to impose liability upon local governments because of the strictly legal actions of their judicial officers. *See Familias Unidas v. Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980). Consequently, the City is not liable for Sams' judicially immune act of issuing an arrest warrant.

Plaintiff's Requested Ancillary Relief

20. Plaintiff failed to prove by legal briefs or evidence adduced at trial that the mere existence of arrest records in the closed files of the City deprives him of a constitutional right. Consequently, the Court will not order expungement. Presumably, because of this opinion and the

Defendants' concern with conscientious and responsible government, an order of expungement will not be necessary. Should this not prove to be the case, Plaintiff may resort to a more than adequate state, judicial-administrative procedure. *See* TEX. CODE CRIM. PRO. ANN. art. 55.01, 55.02. This comprehensive procedure is probably more effective than a federal court order, and avoids an undesirable intervention by the national judiciary in state administration. *See generally Patsy v. Florida International University*, 634 F.2d 900 (5th Cir. 1981), *cert. granted*, ____U.S.____, 50 U.S.L.W. 3244 (1981); and *Cavett v. Ellis*, 578 F.2d 567 (5th Cir. 1978).

21. Since Plaintiff did not establish "that there exists some cognizable danger of recurrent violation," the prayer for permanent injunction is denied. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

Attorney's Fees and Costs

22. Pursuant to 42 U.S.C. § 1988, and the guidance provided by *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the Plaintiff is entitled to reasonable attorney's fees.

> (a) The amount of the award will be based principally on work which was performed in conjunction with legal issues on which Thomas prevailed. He will also be given some credit for the work his attorneys performed on the general issue of immunity since that work contributed to his successful claim. *See Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981), *cert. granted sub nom., Ledbetter v. Jones*, ____U.S.____, 101 S.Ct. 3141 (1981). To determine approximately how much time was spent

on particular claims the Court consulted the affidavit of the Plaintiff, the pleadings, and the evidence and argument presented at trial. Of a total of 127.8 hours claimed by Mr. Watts, and 67.4 hours claimed by Ms. Oren the Court finds approximately 80 and 40 hours, respectively, were related to successful claims.

(b) Plaintiff's cause of action dealt extensively with an area of law, immunity from damages in civil rights suits, which is still evolving.

(c) A lawyer of average skill and diligence could have properly performed these legal services.

(d) The affidavit of the Plaintiff's lawyer alleges that other employment was precluded by this case, but there is no allegation of the monetary impact of such preclusion.

(e) The parties agree that a reasonable fee rate for lead counsel is $100 to $150 per hour, and $60 to $100 per hour for associate counsel.

(f) The Plaintiff's attorney failed to inform the Court of the nature of his fee arrangement with his client except to note that, "I have been employed by Dr. Thomas on a recorded time-rate basis." Apparently this means that payment was strictly according to time expended and consequently there was no contingency of non-payment regardless of the outcome of litigation.

(g) Although the affidavit alleges that while the Plaintiff's attorneys were making appearances on his behalf they could not work on other cases, this does not establish that this case received any priority compared to that received by other cases. Appear-

ance and preparation for appearance in one case always necessitate some preclusion of work in other cases.

(h) Plaintiff recovered $10,000 in damages from Mr. Sams in his individual capacity. This award will have no direct impact on any other person, but may serve to deter future misuse of police authority.

(i) In the words of the Defendants' lawyer, "Plaintiff's counsel is one of the preeminent civil rights attorneys practicing within the Southern District of Texas."

(j) This case is not appreciably "undesirable." Of course, Thomas' attorneys may be somewhat unpopular with the Defendants, but they presumably have earned the goodwill of the Prairie View A & M community through their actions in this controversy. The role of Watts and Oren in this matter is no more undesirable than the role of most attorneys representing a party in litigation.

(k) There is no evidence that the fee in this lawsuit has been affected by any long-standing professional relationship between the principals.

(l) The Plaintiff has alleged and the Court has considered the amount of attorney's fees awarded in cases of a similar nature. In light of all the factors discussed above it is appropriate for the Plaintiff to collect $15,000 in legal fees.

23. No attorney's fees will be awarded for projected work to be done on appeal unless and until that work is completed.

24. The prevailing parties shall recover their costs. *See Croker v. Boeing Co.*, 662 F.2d 975, 998 (3rd Cir. 1981).

25. Any conclusion of law which may be deemed a finding of fact is hereby adopted as such.

DONE at Houston, Texas, this 21st day of May, 1982.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. H-78-1054

DR. ALVIN I. THOMAS

v.

ERISTUS SAMS, B. T. MORGAN, and
THE CITY OF PRAIRIE VIEW

(Filed May 20, 1982)

FINAL JUDGMENT

This action came on for trial before the Court, and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED and ADJUDGED that the Plaintiff Alvin I. Thomas recover of the Defendant Eristus Sams the sum of Ten Thousand Dollars ($10,000.00), with interest thereon at the rate of nine percent (9%) as provided by law, and his costs of action which are attributable to Defendant Sams, and attorney's fees in the amount of Fifteen Thousand Dollars ($15,000.00).

It is ORDERED and ADJUDGED that the Plaintiff take nothing and that the action be dismissed on the merits with respect to Defendants, B. T. Morgan and the City of Prairie View, and that they recover of the Plaintiff, Alvin I. Thomas, their costs of action.

DONE at Houston, Texas, this 20th day of May, 1982.

/s/ ROSS N. STERLING
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CIVIL ACTION NO. 78-H-1054

DR. ALVIN I. THOMAS,
Plaintiff

v.

ERISTUS SAMS, ET AL,
Defendants

(Filed August 9, 1982)

ORDER AND SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pending before the Court is Defendant Eristus Sams' motion for a new trial or, alternatively, for amendment of findings of fact and conclusions of law. Sams argues in turn that he is entitled to judicial immunity, is without liability for the 1978 arrest of the Plaintiff, is entitled to an apportionment of punitive and compensatory damages, and lastly, is entitled to a hearing on the issue of attorney's fees.

The Court holds to its original opinion that Defendant Sams is not absolutely immune from liability in this matter. This conclusion is accurate even though his issuance of the subject arrest warrant was a judicially immune act (Conclusion of Law 7, 10) and even though as Mayor and Magistrate he was authorized by State law to arrest those who violated the law in his presence.[1]

1. In the instant case, of course, Plaintiff's alleged crime did not occur within the sight of Sams and pursuant to state law he was

Pritchett v. State, 214 S.W.2d 623 (Tex. Crim. App. 1948).

What constitutes a "judicial act" to establish judicial immunity in a 42 U.S.C. § 1983 action is an issue of federal law. *Nelson v. Knox,* 256 F.2d 312, 314 (6th Cir. 1958). Accordingly, the mere fact that a government official is denominated a "judge" or "magistrate" under state law does not immunize his non-judicial acts even though his judicial work is absolutely immune. *See Stump v. Sparkman,* 435 U.S. 349, 361 n. 10 (1978) *citing Gregory v. Thompson,* 500 F.2d 59 (9th Cir. 1974) and *Lynch v. Johnson,* 420 F.2d 818 (6th Cir. 1970). *Gregory v. Thompson, supra,* held the execution of a judicial order and the physical enforcement of law and order by a judge, in the courtroom, not to be "part of the judicial function" since that action was executive in nature. The second case, *Lynch v. Johnson, supra,* held that a "judge . . . was not entitled to judicial immunity because his service on a board with only legislative and administrative powers did not constitute a judicial act." *Id.* at 361 n. 10. Sams investigation of the alleged violation of the law at Prairie View A & M and his swearing out of a complaint were, similarly, executive acts of misguided law enforcement. Conclusion of Law 7. Under the controlling federal standard they were not judicial acts entitled to immunity.

Secondly, although Sams as Mayor or private citizen took advantage of his judicial capacity as magistrate,

---

without power to arrest or issue an arrest warrant unless a sworn complaint was presented to him. TEX. CODE CRIM. PRO. ANN. art. 14.02, 1503. No complaint was presented to him except the one he swore himself. It is, therefore, clear that the initiation of criminal proceedings by the swearing out of the complaint was not a meaningless formality, but was in fact a critical step in the deprivation of Plaintiff's constitutional rights under color of state law.

thus establishing immunity for his magisterial acts, no other person "dealt with the judge in his judicial capacity," *see Stump v. Sparkman, supra* at 362, until Plaintiff's constitutional rights had already been violated. Mr. Nichols and the other witnesses, *see* Finding of Fact 6, dealt with Sams in his executive capacity as the chief law enforcement officer of the City. They reported the incident to Sams apparently because they wanted him to investigate, and take appropriate action. It is clear they did not approach him in his judicial capacity because they did not file a complaint, thus being either unable or unwilling to invoke the judicial machinery and power which is generally necessary in this country to effectuate an arrest and criminal prosecution. They went to him as Mayor, not Judge. Since no one dealt with Mayor or Citizen Sams in a "judicial capacity," he is not immune for his non-magisterial acts of investigating the incident and initiating criminal proceedings. *Stump v. Sparkman, supra.*

Sams is also mistaken in arguing that he is insulated from liability for the unconstitutional arrest of Plaintiff which he foreseeably caused by signing the complaint. The Constitution guarantees that no person will be arrested except on probable cause. *Franks v. Delaware,* 438 U.S. 154 (1978); *United States v. Watson,* 423 U.S. 411 (1976); and *Spinelli v. United States,* 393 U.S. 410 (1969). Plaintiff was arrested without probable cause. Conclusions of Law 2-5. Sams was the initiating party and is responsible for causing the arrest.

In *Smith v. Gonzales,* 670 F.2d 522 (5th Cir. 1982), a case cited by Sams, the defendant there, conversely to this case, did not initiate the complaints with the judicial authorities which resulted in issuance of the coroner's

warrant and the incest charge. *Id.* at 525. Further, in *Rodriguez v. Ritchey,* 556 F.2d 1185, 1193 (5th Cir. 1977) the court did *not* hold as a general proposition that a magistrate's determination of probable cause breaks the causal chain and insulates the initiating party from liability. That rule of insulation applies only when the initiating party acts without malice. The *Rodriguez* court specifically noted that in other cases the common law action of malicious prosecution is available to an injured plaintiff. *Id.* Under the common law a mistake by the magistrate does not protect a malicious defendant such as Sams who has initiated criminal charges which have damaged a plaintiff. RESTATEMENT (SECOND) OF TORTS § 653, Comment c (1976). Not even a plurality of the judges sitting en banc joined in the opinion of the court in *Rodriguez.* Accordingly, in light of the concurrence by Judges Hill and Gee, that decision does not unequivocably stand for even the proposition that a grand jury indictment insulates a malicious defendant from liability for damages which he has caused by swearing out a complaint.

In the present case Sams cannot escape liability for his role in instigating the criminal prosecution of the Plaintiff. Arrest of an individual without established probable cause at the time of arrest, *see Giordenello v. United States,* 357 U.S. 480, 486 (1958), violates the fourth amendment even if it results from a facially valid warrant. *Aguilar v. Texas,* 378 U.S. 108 (1964). Immunities in section 1983 actions derive from the common law. *Wood v. Strickland,* 420 U.S. 308, 313-22 (1975). The common law does not provide immunity from liability to a malicious defendant who has erroneously convinced a magistrate to issue an arrest warrant. 1 F.

HARPER & F. JAMES, THE LAW OF TORTS § 4.3 (1956); W. PROSSER, LAW OF TORTS § 119 (4th ed. 1971); and RESTATEMENT (SECOND) OF TORTS § 653 (1976). Unless a common law immunity is available, a defendant is liable under the Civil Rights Act to another who has been deprived of his constitutional rights by the acts of the defendant. 42 U.S.C. § 1983; *Owen v. City of Independence*, 445 U.S. 622, 638 (1980). *See Lugar v. Edmondson Oil Co.*, ____U.S.____, 50 U.S.L.W. 4850 (1982).

The Court found that Sams initiated criminal proceedings against the Plaintiff without probable cause, Conclusions of Law 2-5, and with malice, Conclusion of Law 8, 10. He is liable therefore.[2]

In the third alternative, even if as a matter of law the magistrate's intermediate decision breaks the causal chain of liability, such a rule is inapplicable here where the "intermediary" and the Defendant are one and the same person. A defendant should not be able to broadly abuse his governmental power with impunity simply because one of his narrower, legitimate powers is judicial in nature.

---

2. Although the Supreme Court has recently modified the *Wood v. Strickland*, 420 U.S. 308 (1975), balancing test used to determine the availability of the qualified immunity defense, this Court remains convinced that Sams is liable because his "conduct . . . violate[d] clearly established . . . constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, _____ U.S._____, _____, 50 U.S.L.W. 4815, 4820 (1982). *See* Conclusion of Law 8. Alternatively, if Sams acted as a private person in swearing the complaint he is entitled to no immunity whatsoever, even though state officials approved his decision to initiate proceedings. *See, e.g., Lugar v. Edmundson Oil Co.*, ____U.S.____, 50 U.S.L.W. 4850 (1982).

With respect to Defendant's argument concerning an apportionment of damages, the Court finds by way of clarification that $7,500 in damages are actual losses suffered by Plaintiff resulting from violation of his fourth amendment rights, including embarrassment, and loss of freedom, reputation, good health, and the sense of security that the fourth amendment was designed to protect. A total of $2,500 was awarded as punitive damages to discourage future violations of the fourth amendment by malicious individuals who might be tempted to misuse police authority. The Court finds the remaining arguments contained in Defendant's motion to be unpersuasive.

The foregoing discussion of Defendant's entire motion is hereby incorporated in *toto* as a supplement to the Court's Findings of Fact and Conclusions of Law entered in this cause on May 21, 1982.

It is, therefore,

ORDERED that the Findings of Fact and Conclusions of Law entered in this cause on May 21, 1982, are supplemented to the extent specified in this Order; Defendant's motion for new trial or, alternatively, for amendment of findings of fact and conclusions of law is GRANTED only to clarify the apportionment of punitive and compensatory damages as specified herein, but is in all other things DENIED.

DONE at Houston, Texas, this 9th day of August, 1982.

/s/ ROSS N. STERLING
United States District Judge

BEST AVAILABLE COPY

Office-Supreme Court, U.S.
FILED
FEB 22 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-954

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

CITY OF PRAIRIE VIEW, TEXAS
and ERISTUS SAMS,
Petitioners

versus

ALVIN I. THOMAS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LARRY WATTS
WATTS & COMPANY, LAWYERS, P.C.
2201 Fannin
Houston, Texas 77002
(713) 650-0252

Attorney for Respondent
Alvin I. Thomas

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

26 pp

QUESTIONS PRESENTED

(1) Whether a mayor's unconstitutional acts in furtherance of a city's sewage treatment project are attributable to the city when the city has given the mayor the final authority to define the city's goals regarding the project and to choose the means of achieving those goals.

(2) Whether a mayor who investigates and files a criminal complaint as mayor with malice and without probable cause and subsequently, as magistrate, issues an arrest warrant based on his own complaint, is liable under 42 U.S.C. § 1983 for injuries caused by his conduct.

LIST OF PARTIES

Petitioners' List of Parties is correct.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
LIST OF PARTIES	1
TABLE OF AUTHORITIES	III
OPINION BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
Proceedings Below	2
Respondent's Statement of Facts	3
SUMMARY OF ARGUMENT	7
ARGUMENT	7
The City of Prairie View, Texas delegated to Mayor Sams the final authority in all matters relating to the sewage treatment project, including the removal of obstacles to the project's completion on the City's terms.	7
Mayor Sams' acts of investigating and swearing out the complaint against Dr. Thomas constituted action under color of state law under 42 U.S.C. § 1983.	11
Mayor Sams' filing of the complaint with malice and without probable cause caused violation of Dr. Thomas' rights under the Fourth Amendment and is actionable under 42 U.S.C. § 1983.	12
CONCLUSION	15
APPENDIX	
Defendants' Exhibit 1—"Eyewitness Account of What I Saw on May 27, 1978," (letter report to Mayor Sams from Councilman and Mayor Pro-Tem Jack Echols)	1a
Plaintiff's Exhibit 14—"Complaint" signed by Mayor Sams	3a
Plaintiff's Exhibit 13—"Warrant" for Dr. Thomas' arrest issued by Magistrate Sams	5a

TABLE OF AUTHORITIES

CASES

	Page
Augustine v. Doe, 740 F.2d 322 (5th Cir. 1984)	13, 14
Baker v. McCollan, 443 U.S. 137 (1979)	13, 14
Bennett v. City of Slidell, 728 F.2d 762 (5th Cir. 1984)	8, 9, 10
Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982)	13
Crowe v. Lucas 595 F.2d 985 (5th Cir. 1979)	13
Dennis v. Sparks, 449 U.S. 24 (1980)	12
Garris v. Rowland 678 F.2d 1264 (5th Cir. 1982)	13
Guenther v. Holmgreen, 738 F.2d 879 (9th Cir. 1984)	13
Hudson v. Palmer, ____U.S.____, 104 S.Ct. 3194 (1984)	14
Llaguno v. Mingey, 739 F.2d 1186 (7th Cir. 1984)	13
Losch v. Borough of Parkesburg, Pa., 736 F.2d 903 (3rd Cir. 1984)	13
Lugar v. Edmondson Oil Co., ____U.S.____, 102 S.Ct. 2744 (1982)	11
McKenzie v. Lamb, 738 F.2d 1005 (7th Cir. 1984)	13
Monell v. Department of Social Services, 436 U.S. 658 (1978)	8, 9, 10
Nixon v. City of Houston, 560 S.W.2d 447 (Tex. Civ. App. —Houston [14th Dist.] 1977)	10
Parratt v. Taylor, 451 U.S. 527, 101 S.Ct. 1908 (1981)	13, 14
Rodriguez v. Ritchey, 556 F.2d 1185 (5th Cir. 1977), *cert. denied,* 434 U.S. 1047 (1978)	12
Smith v. Gonzales, 670 F.2d 522 (5th Cir. 1982), *cert. denied,* 459 U.S. 1005 (1982)	12
Thibodeaux v. Bordelon, 740 F.2d 329 (5th Cir. 1984)	14
Thomas v. Sams, 734 F.2d 185 (5th Cir. 1984), *rehearing denied,* 741 F.2d 783 (5th Cir. 1984)	1, 2, 8, 9, 13
Tower v. Glover, ____U.S.____, 104 S.Ct. 2820 (1984)	12

ADVISORY OPINIONS

Op. Tex. Att'y Gen. No. MW-563 (1982)	10

NO. 84-954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CITY OF PRAIRIE VIEW, TEXAS
and ERISTUS SAMS,
Petitioners

versus

ALVIN I. THOMAS,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent Dr. Alvin I. Thomas respectfully prays that the Petition for Writ of Certiorari of Eristus Sams and the City of Prairie View, Texas be denied.

OPINION BELOW

The opinion of the Court of Appeals on appeal and cross appeal is reported as *Thomas v. Sams,* 734 F.2d 185 (5th Cir. 1984). The Court of Appeals opinion denying Petitioner Sams' Petition for Rehearing and Sug-

gestion for Rehearing en banc is reported as *Thomas v. Sams,* 741 F.2d 783 (5th Cir. 1984). Both opinions are reproduced in the Appendix to the Petition at A-18. The Trial Court's Findings of Fact and Conclusions of Law, Final Judgment and Order and Supplemental Findings of Fact and Conclusions of Law are reproduced in the Appendix to the Petition at A-22.

JURISDICTION

Petitioners' statement of jurisdiction is acceptable to Respondent.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case arises under the Fourth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. Petitioners have correctly stated the text of § 1983.

STATEMENT OF THE CASE

Proceedings Below

Respondent's complaint alleged violations of his rights under the Fourth and Fourteenth Amendments. The violations arose out of Dr. Thomas' arrest by Police Chief Booker T. Morgan pursuant to a warrant issued by Petitioner Sams as Magistrate on the strength of a complaint sworn out by Sams as Mayor. Sams and Morgan claimed absolute judicial immunity for their acts, and the City of Prairie View denied endowing Sams with the authority sufficient to render the City liable for his acts.

The Trial Court sitting without a jury found that Sams had acted with malice and without probable cause in vio-

lation of Dr. Thomas' Fourth Amendment rights. The Court held that Sams' non-judicial acts of investigating and filing the complaint as Mayor constituted action under color of state law sufficient to make him liable for Dr. Thomas' injuries. The Trial Court found no liability in Morgan and declined to hold the City liable for what it termed "strictly legal" acts of the Mayor. The Court denied Mayor Sams' Motion for New Trial, entering Supplemental Findings of Fact and Conclusions of Law which reiterated the holding that judicial immunity did not protect Sams from liability for acts done in his Mayoral capacity which set in motion an unbroken chain of events resulting in Dr. Thomas' unconstitutional arrest.

On appeal the Court of Appeals for the Fifth Circuit upheld the Trial Court's decision about Sams but found that, based on the record as a whole and the uncontradicted evidence, the Trial Court was clearly erroneous in failing to attach liability to the City. The Court of Appeals denied Sams' Petition for Rehearing, correctly applying the laws of Texas and the United States in holding that Sams' non-judicial acts were done under color of state law and pursuant to the policymaking authority delegated by the City.

Respondent's Statement of Facts

In May of 1978 the personal and political animosity between Mayor Sams and President Thomas [R. 32, Findings of Fact and Conclusions of Law, hereinafter "FF/CL"; Transcript, hereinafter "Tr.", 216-225] intruded upon the Mayor's conduct of the City of Prairie View's sewer-line dispute with the University and resulted in the unlawful arrest of President Thomas.

In 1972 the City of Prairie View and the Board of Directors of the Texas A & M University System, the governing body of Prairie View A & M, had agreed to a joint treatment plan for the sewage of the City and the University. The Board of Directors adopted a resolution agreeing to treatment of municipal sewage at the University's treatment plant with the understanding that the City would construct and maintain sewer lines across the school's land to gain access to the plant. [R. 33, (FF/CL); *See* PX 5] All parties, including Mayor Sams and the City of Prairie View, knew that the City had no authority to construct the pipelines until service rates were agreed upon and easements were approved by the Board of Directors, which, pursuant to State law, had the sole authority to grant easements. [R. 33, (FF/CL); *See* Tr. 33, 41, 209-211].

Uncontradicted testimony at trial established that as of May 1978, the City had failed to submit an acceptable engineering proposal for laying pipeline to connect with the University's sewage treatment plant. [R. 34, (FF/CL); *See* Tr. 80]. The City and Mayor Sams knew that approval was necessary before constructing any pipeline and that it had been denied. [R. 35, (FF/CL); *See* Tr. 80, 230, 302-303]. Nonetheless, in May 1978, Mayor Sams ordered the City contractor to enter University property and begin laying pipe according to a rejected plan which, among other inadequacies, called for the digging of a trench beneath the future site of the University chapel. [R. 35 (FF/CL); *See* Tr. 229-230, 363-364].

As Mayor, Sams informed his City Council that he ordered the digging to begin on University land and reported regularly to them on its progress. [Tr. 229]. Mayor Sams sent Police Chief Morgan to "see that the job kept

moving along" and to "let me [Sams] know if anything occurred." [Tr. 235-236; *See also* Tr. 364]. The digging was discovered once by University personnel who told the contractor that it was illegal and must stop. [Tr. 158-159, 175]. Subsequent to this interruption the City's engineer reopened negotiations with the University staff and admitted that he knew permission was required before construction could begin, but that Mayor Sams had ordered him to proceed regardless of the lack of approval. [R. 35, (FF/CL); *See* Tr. 90, 107].

On the Mayor's orders, the City's workers resumed digging a few days later under the eye of Police Chief Morgan. [Tr. 232-233]. University officials confronted Mayor Sams at the site of the illegal digging, warned him again that he could not dig until a plan was approved, and on the advice of the District Attorney read him the criminal trespass law. [Tr. 86, 132-135]. The Mayor replied that he was going to do it anyway [Tr. 88], but stopped the digging at that time and left. [Tr. 89].

Without bothering to seek the advice of the City's attorney [R. 44, (FF/CL)], Mayor Sams ordered the City's crew back onto the school's land to complete the line and hook into the University sewer system. [R. 35, (FF/CL)]. Mayor Sams announced the completion of the line and a planned water test through the line to City Council at its regular Monday night meeting on May 22, 1978. [DX 1]. Subsequently, the hookup was discovered and the University sent the City letters warning that the University would have to intersect the line if the City refused to disconnect it. [R. 36, (FF/CL); *See* Tr. 91-92]. When the City failed to act, Dr. Decatur Rogers, on or about May 27, 1978, had the lines cut and capped. [R. 36, (FF/CL); *See* Tr. 92].

Council member and Mayor Pro-Tem, Jack Echols witnessed the intersection of the line. He rushed to the nearby business of another council member to report the incident to Mayor Sams and later gave Sams a signed statement about the incident. [DX 1; Tr. 239-240]. This statement is reproduced at 1a-2a. After sending the Police Chief to investigate, Mayor Sams put on his other hat as justice of the peace and magistrate, swore out a warrant and ordered Morgan to arrest Dr. Rogers on May 30, 1978. [R. 36, (FF/CL); Tr. 238].

In his hat as investigator, Mayor Sams personally interrogated Dr. Rogers. On the basis of his statement that he intersected the pipe because "I had a job to do just like you have," [R. 36, (FF/CL); Tr. 286], Mayor Sams personally swore out a complaint against Dr. Thomas, President of the University, for ordering the cutting of the sewer pipes. [R. 36, (FF/CL); Tr. 272; PX 4]. Relying on his complaint which he signed "Mayor", Sams then put on his other hat as magistrate and issued a warrant for Dr. Thomas' arrest for "Coercion of Employees to Destroy City and Public Property . . ." [R. 36, (FF/CL); PX 13; Tr. 240]. The complaint and warrant are reproduced at 3a-6a.

When he issued the warrant Mayor Sams lacked any probable cause to believe that Dr. Thomas had committed the acts charged, or that any offense at all had been committed. [R. 39-41, (FF/CL)]. Moreover, Sams had no specific offense in mind. [Tr. 247].

Dr. Thomas was taken into custody in full view of his students and faculty [R. 37, (FF/CL)], and upon his arrival at City Hall, Mayor Sams came out of City Hall and said, "Get into my truck, I want to take you some-

where," (apparently meaning the construction site). [Tr. 312, 149]. When Dr. Thomas refused to go, Mayor Sams took him inside, interrogated him in front of an audience, and ultimately put on his magisterial hat and set a cash bond of $200.00. Later, Mayor Sams released a statement to the press, [Tr. 277, 282-3] but Plaintiff was never brought to trial. [Tr. 321].

SUMMARY OF THE ARGUMENT

The decision below was made after the Court of Appeals fully and fairly considered all issues of fact and law and decided the issues correctly. The Court applied the well established principles of law regarding individual and municipal liability under 42 U.S.C. § 1983 to a unique fact situation and arrived at the only result which is both consistent with those principles and fair to the parties. Petitioners are asking this Court to review factual findings which have substantial, uncontradicted support in the record. This case thus presents no legal questions of special importance which justify the granting of a writ of certiorari.

ARGUMENT

The City of Prairie View, Texas delegated to Mayor Sams the final authority in all matters relating to the sewage treatment project, including the removal of obstacles to the project's completion on the City's terms.

The City entrusted to Mayor Sams the entire conduct of the executory plan for joint treatment of sewage with the University. Mayor Sams was in charge of supervising

negotiations for the final engineering plan. As time went by with no agreement in sight, the sewage treatment plan became a matter of urgent concern to both the City and its Mayor. Knowing that University approval was an absolute prerequisite to the laying of pipe on University land, and knowing that the University had legitimately rejected the latest plan, the City Council received with approval Sams' report of the successful, secret, illegal completion of the line. The City not only ratified this unlawful act, but also looked forward to compounding the trespass by test-running water through the line. Although the University made formal demand for removal of the line, the City refused. When Councilman Echols witnessed the cutting and capping of the line, he rushed to another councilman's place of business, not to call an emergency City Council meeting, but to call the Mayor. The actual eyewitnesses did not swear out complaints; the Mayor did.

The facts are uncontradicated, and the Court of Appeals, in reviewing the Trial Court's finding of no municipal liability, was "left with the definite and firm conviction that the Mayor was 'the official to whom the law makers [had] delegated the policymaking authority' to decide whether a person who interrupted completion of the line would be arrested." *Thomas v. Sams,* 741 F.2d 783, 784 (5th Cir. 1984), *denying rehearing to* 734 F.2d 185 (5th Cir. 1984), *citing Bennett v. City of Slidell,* 728 F.2d 762 (5th Cir. 1984).

Bennett is the Fifth Circuit's refinement of the standards for establishing municipal liability under § 1983 which were first set out by this Court in *Monell v. Department of Social Services,* 436 U.S. 658 (1978). A city may be liable if the unconstitutional act or policy

was done or made by an official to which the city has given the authority to act or make policy. *Thomas,* 734 F.2d at 192. The *Bennett* Court defined a city policymaker as one who "decide[s] the goals for a particular city function and devise[s] the means of achieving those goals." *Bennett,* 728 F.2d at 769. The city supervises only the results of a policymaker's decisions, retaining financial control and final legal control in its ability to limit or revoke the delegated authority. *Id.*

Applying this definition and principle to the facts of this case, the Court of Appeals held that the City of Prairie View had delegated to the Mayor the authority to set the goals for the sewage treatment project and to devise the means of achieving the goals. *Thomas,* 734 F.2d at 192-93. Petitioners agree that this was a correct finding. The Court of Appeals then correctly held that the Trial Court's finding of no city liability was clearly erroneous. Reconsideration of this purely factual issue does not justify the granting of certiorari.

Petitioner's insistence that the City's liability must be based on formal authorization of a specific act by resolution at a council meeting is anachronistic in light of *Monell* and *Bennett.* Neither *Monell* nor its progeny requires that city authorization for a policymaker's acts be explicit or even express. The requirement is for either express authorization or that the city ". . . by its conduct or practice encourage or acknowledge the [Mayor] in a policymaking role . . . The governing body must expressly or impliedly acknowledge that the [Mayor] . . . acts in lieu of the governing body . . ." *Bennett,* 728 F.2d at 769. The evidence supports the characterization of Mayor Sams as the City's policymaker regarding the sewage treatment project.

Neither is Petitioner helped by an examination of Texas law, which, contrary to the City's inapposite analogy, does not require that a Mayor's individual acts be officially voted on, signed and sealed before the City can be said to have approved them. The applicable statute provides that, in addition to the enumerated duties, the mayor ". . . shall perform such other duties and possess and exercise such other power and authority as may be prescribed and conferred by the city council." Tex. Rev. Civ. Stat. Ann. art. 996 (Vernon 1963). As construed by the Attorney General of Texas, this statute allows the mayor to establish local policy unilaterally upon proper delegation of such policymaking authority, as does *Bennett*. Op. Tex. Att'y Gen. No. MW-563 (1982). Under Texas case law, where, as here, the mayor is given a power or duty by the city, the city has impliedly given the mayor the authority to do whatever is ". . . necessary to make that power effectual or essential to the performance of that duty . . .". *Nixon v. City of Houston*, 560 S.W.2d 447, 449 (Tex. Civ. App.—Houston [14th Dist.] 1977). This is also consistent with *Bennett* and *Monell*.

All the evidence in this case establishes that the city council authorized Mayor Sams to make policy regarding the sewage treatment project unilaterally. The Mayor was thus impliedly authorized to do all acts in furtherance of that policy, including removing any obstacles to completion of the project on the City's terms. The Court of Appeals correctly applied Texas and federal law in holding that the City of Prairie View was liable for the unconstitutional acts of its mayor.

Mayor Sams' acts of investigating and swearing out the complaint constituted action under color of state law under 42 U.S.C. § 1983.

The Court of Appeals resolved the Trial Court's equivocal characterization of Mayor Sams' non-judicial acts by a simple, common sense analysis. Sams signed the complaint as Mayor. The term "Mayor" appears twice on the complaint; clearly, Sams thought he was acting officially. Police Chief Morgan, Councilman and Mayor Pro Tem Echols, and the citizens who actually witnessed the events at the University all looked to Sams in his capacity as Mayor to do something about the situation. Even the Trial Court, in its Supplemental Findings of Fact and Conclusions of Law, defined Sams' behavior as "executive acts of misguided law enforcement." It is true that any private citizen who did not witness the cutting of the sewer line could have done what the Mayor did. But in Prairie View, Texas, even citizens who did witness the event chose to turn to their Mayor for official action, and he obliged by filing the complaint as Mayor.

Petitioner Sams' semantic problem with the difference between "governmental" and "private" action under § 1983 presents no question for this Court, which has defined actions under color of state law to be those actions which are "fairly attributable" to the state. *Lugar v. Edmondson Oil Co.*, ____U.S.____, ____, 102 S.Ct. 2744, 2754 (1982). This determination is made in two parts. First, the constitutional deprivation must be the result of the exercise of a right or privilege with its origins in state law. Second, the person accused must be fairly said to be a state actor, either because he is a state official, because he has acted in concert with state officials, because he has received "significant aid" from state of-

ficials, or because his acts are "otherwise chargeable to the state." *Id.* Private parties who act in collusion with state officials are therefore considered to be state actors for purposes of § 1983. *Id.*, at 2756; *Tower v. Glover*, ____U.S.____, ____, 104 S.Ct. 2820, 2824 (1984); *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980). Whether Sams acted as Mayor or as a private citizen, he was acting under color of state law, by virtue of his own official position or his acts in concert with Councilman Echols and Police Chief Morgan and even with himself in his capacity as Magistrate.

Mayor Sams' filing of the complaint with malice and without probable cause was a violation of Dr. Thomas' rights under the Fourth Amendment and is actionable under 42 U.S.C. § 1983.

Mayor Sams' act of filing the complaint with malice and without probable cause set in motion a chain of events which resulted in Dr. Thomas' arrest in violation of his Fourth Amendment rights, as extended to the states by the Fourteenth Amendment. Had the Mayor chosen to present his hearsay-based complaint to a neutral and independent magistrate, Dr. Thomas would not have been arrested, and this lawsuit would not have been necessary, because an impartial intermediary's independent decision as to probable cause "breaks the causal chain and insulates the initiating party." *Smith v. Gonzales*, 670 F.2d 522, 526 (5th Cir. 1982), *cert. denied*, 459 U.S. 1005 (1983), *citing Rodriguez v. Ritchey*, 556 F.2d 1185, 1193 (5th Cir. 1977), *cert. denied*, 434 U.S. 1047 (1978). The Court of Appeals properly separated Sams' judicially immune act of issuing the warrant from his non-immune act of filing the complaint and determined his liability

accordingly. *Brewer v. Blackwell,* 692 F.2d 387, 396 (5th Cir. 1982); *Crowe v. Lucas,* 595 F.2d 985, 990 (5th Cir. 1979). *Cf. Baker v. McCollan,* 443 U.S. 137, 145 (1979) (The reasonable division of functions between executive and judicial officers is entirely consistent with due process of law.). As the Court of Appeals concluded, "Sams's theory is sound, but its application in this case is flawed." *Thomas,* 734 F.2d at 190. The Court of Appeals' decision was a necessarily narrow one dealing with an unusual fact situation and hardly opens the door to federal lawsuits every time a criminal proceeding is improperly initiated. The door was opened in this case because the proceeding was improperly initiated and improperly concluded by the same person.

Nor does the Fifth Circuit's opinion imply that every injury in which a state official takes part is actionable under § 1983. This case involves a violation of Dr. Thomas' right under the Fourth Amendment to be free from arrest without probable cause, and is actionable under § 1983. *Parratt v. Taylor,* 451 U.S. 527, ____, 101 S.Ct. 1908, 1913 (1981); *Baker v. McCollan; Augustine v. Doe,* 740 F.2d 322 (5th Cir. 1984); *Garris v. Rowland,* 678 F.2d 1264 (5th Cir. 1982); *Llaguno v. Mingey,* 739 F.2d 1186, 1193 (7th Cir. 1984) (the exigencies of the moment may sometimes excuse the lack of a warrant; they can never excuse the lack of probable cause); *McKenzie v. Lamb,* 738 F.2d 1005 (7th Cir. 1984); *Guenther v. Holmgren,* 738 F.2d 879 (9th Cir. 1984); *Losch v. Borough of Parkesburg, Pa.,* 736 F.2d 903, 907 (3rd Cir. 1984) (". . . the filing of charges without probable cause and for reasons of personal animosity is actionable under § 1983.").

Petitioner Sams has quoted various § 1983 cases, including *Parratt* and *Baker,* out of context in order to create an issue where none exists. *Parratt* concerned a violation of procedural due process, and this Court concluded that where adequate state remedies for such violations existed, the injured party must seek those remedies rather than redress under § 1983. The *Parratt* Court recognized the difference in the minimal violation of the prisoner's property rights and substantive violations of constitutional guarantees. *Parratt,* 101 S.Ct. at 1913. Substantive violations are actionable regardless of the state process available because the unconstitutionality is in the act itself, no matter what process is available for its redress. *Augustine,* 740 F.2d at 326-27 (Fourth Amendment); *Thibodeaux v. Bordelon,* 740 F.2d 329, 333 (5th Cir. 1984) (Eighth Amendment). This is consistent with this Court's recent decision in *Hudson v. Palmer,* ____U.S.____, 104 S.Ct. 3194 (1984), holding the *Parratt* rule applicable to intentional deprivations of property, as made clear by Mr. Justice Stevens in his concurrence. *Hudson,* 104 S.Ct. at 3208 & n.4.

Even without benefit of its own definitive analysis in *Augustine,* the Fifth Circuit correctly made the distinction between common law and constitutional torts, and held Mayor Sams liable for his unconstitutional acts.

CONCLUSION

Respondent respectfully submits that Petitioners have wholly failed to sustain their burden under Rule 17 of establishing that there are special and important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been, but should be settled by this Court; nor has the Court of Appeals decided a federal question in a way to conflict with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals applied well-established principles of law to the unusual facts of this case in reaching its fair and correct decision. For all the foregoing reasons, Respondent prays that the Petition for Writ of Certiorari to the Fifth Circuit be denied.

Respectfully submitted,

WATTS & COMPANY, LAWYERS, P.C.

LARRY WATTS, TBA #20981000
2201 Fannin Street
Houston, Texas 77002
(713) 650-0252

Attorney for Respondent

DEFENDANTS' EXHIBIT 1

"Dx 1"

Mayor Eristus Sams
City of Prairie View
Prairie View, Texas 77445

Re: An Eyewitness Account of what I saw on May 27, 1978, in the Cutting and Destroying of City and Public Property

Dear Mayor Sams:

As a duly elected City Official and appointed Mayor-Pro-Tem by the City Council, which is required by state law for any General City Law, I hereby wish to report the following incident which I witnessed on the morning of Saturday, May 27, 1978:

1. I went to the U. S. Post Office at approximately 8:30 A.M., which is located on the Prairie View A& M University campus. On my way out of the Post Office, I looked across the campus, about ½ mile south of where I was standing, and noticed a lot of activity with a back-hoe and campus laborers working very rapidly within the vicinity of the location where the city had installed a new 6 inch sewerage line, crossing the south edges of the campus. Knowing that the contractors had completed the said installation of the sewerage force line, and the Mayor had also notified the City Council of the completion of the line in the last regular Council Meeting on May 22, 1978, my concern was aroused as to what all the further activity was all about. I decided to drive around to the vicinity from where I stood, which was about 3/4 mile to investigate. It was necessary to follow the road around the campus to reach the spot. I found the crew working very rapidly, and about the time I reached the area the back-hoe crew was moving to another section of the sewerage line area where the city crossed under F.M. 1098 Loop Road on the Southwest area, across the road in front of Mr. Madison Kilpatrick's home. Mr. Kilpatrick and his son witnessed the cutting of a four inch force line, which had been completed for use.

2. Dr. Decatur Rogers of Prairie View A & M Univesity was in charge of the wrecking or digging and cutting crew, which were using a saw steel blade to cut and remove several pieces of pipe.

Mr. Booker T. Morgan, City Chief of Police was contacted and told of the activity. He came on the scene and talked with Mr. Kilpatrick and me about the offense. I hurriedly left the scene and sped in my car to the Exxon Service Station on U. S. 290 Highway, operated by Councilman T. R. Lawson, where an attempt was made to contact the Mayor to officially report the offense.

Respectfully yours,

Jack W. Echols
Signed & Sworn by Councilman and Mayor-Pro-Tem

See page 2 for Notary Signature

Dx-5 8-17-81

City of Prairie View
SEAL

Margie M. Lewis
Attest: City Secretary

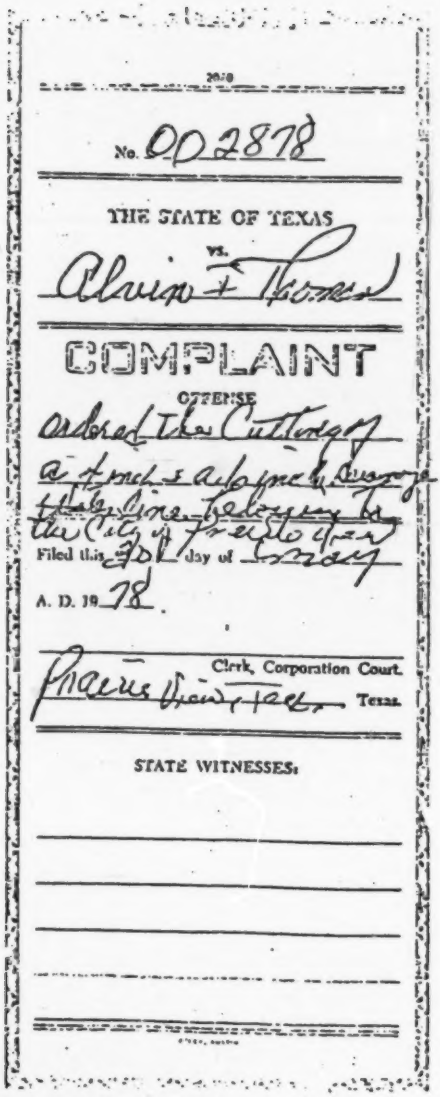
BEST AVAILABLE COPY

Sworn to and subscribed before me this 29th day of May
1978.

Margie M. Lewis Notary Public in and for Waller
County Texas. My Commission expires 10-4-79

BEST AVAI

PLAINTIFF'S EXHIBIT 14



2010

No. 002878

THE STATE OF TEXAS

vs.

Alvin F Flores

COMPLAINT

OFFENSE

ordered the Cutting of
a tree & obstruction Driveway
the Gas Line belonging to
the City of Freeport Texas

Filed this 30 day of May

A. D. 19 78.

Clerk, Corporation Court.

Phaires Brandt Jr. Texas

STATE WITNESSES:

ABLE COPY

IN THE NAME AND BY AUTHORITY OF THE STATE OF TEXAS:

I, Eurstus Sams (Mayor), being duly sworn, do state upon my oath that:

[1] I have personal knowledge

[1] I have good reason to believe and do believe based upon the following information:[2]

and I charge that heretofore, and before the making and filing of this complaint, on or about the 30 day of May, 1978, in the City of Pauline Dam in Waller County and State of Texas, Defendant did then and there unlawfully Ordered The Cutting of a 4 inch and a branch power of line belonging to the City of Pauline Dam

[1] Contrary to the Ordinances of said City, and

AGAINST THE PEACE AND DIGNITY OF THE STATE.

Eurstus Sams
Complainant

SWORN TO AND SUBSCRIBED BEFORE ME by Robert T. Morgan a credible person, this 30 day of May, A. D. 1978.

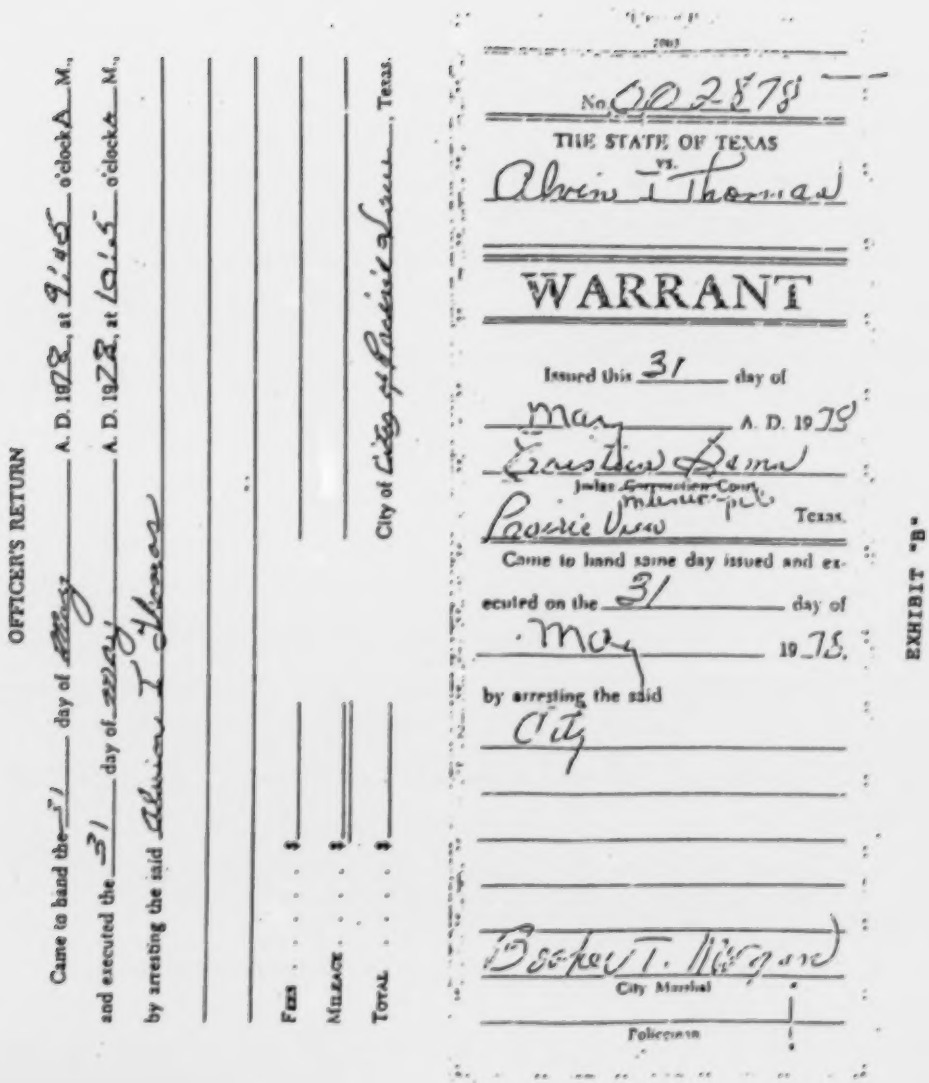
Eurstus Sams
Mayor
(Title)
(City and/or County) Texas

[1] Strike if not applicable.

[2] Set forth the facts upon which the complainant bases his belief if he does not have personal knowledge.

BEST AVA

PLAINTIFF'S EXHIBIT 13



No. 002878

THE STATE OF TEXAS

vs.

Alvin I Thomas

WARRANT

Issued this 31 day of

May A. D. 1978

Lucius Lamar

Justice Corporation Court

Laurie Vann Municipal Texas.

Came to hand same day issued and executed on the 31 day of

May 1978,

by arresting the said

City

Booker T. Morgan

City Marshal

Policeman

OFFICER'S RETURN

Came to hand the 31 day of May A. D. 1978, at 9:45 o'clock A. M., and executed the 31 day of May A. D. 1978, at 10:15 o'clock M., by arresting the said Alvin I Thomas

Fees . . . . . $

Mileage . . . . . $

Total . . . . . $

City of City of Pinehurst, Texas.

EXHIBIT "B"

LABLE COPY

THE STATE OF TEXAS

County of Waller
City of Prairie View

The State of Texas to the Chief of Police, Marshal, or any policeman in Prairie View, Texas—Greeting:

WHEREAS, Complaint under oath in writing has been made before me, charging that in the City of Prairie View, County of Waller and State of Texas, on the 30 day of May, A. D. 19 78 Alvin T. Thomas did commit the offense of Carrying Explosives to Destroy City Property, Digging up of such, and a Knife Sharpener, Which Belongs to the City of Prairie View, Texas contrary to the statutes in such cases made and provided, and against the peace and dignity of the State and against the Ordinances of the City of Prairie View, Texas.

THESE ARE THEREFORE TO COMMAND YOU to arrest the said Alvin T. Thomas and immediately bring him before the Judge of the Municipal Court in the City of Prairie View, Texas to answer said complaint.

HEREIN FAIL NOT, but due service and return make of this Writ as the law directs.

Given under my hand at office this the 31 day of May, A. D. 19 78

Ernestine Jones Judge, Municipal Court Prairie View, Texas.

BEST AVAILABLE COPY